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New York (State) Reports. Supreme Court.
131

HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

BY R. M. STOVER,
REPORTER.

VOLUME LXI.

ALBANY:
WILLIAM GOULD & SON,
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PRACTICE REPORTS.

SUPREME COURT.

LAWRENCE ENNIS agt. LAWRENCE A. CURRY and others.

Attorney's lien — Set-off of judgment — Code of Civil Procedure, section 66.

The plaintiff, having recovered judgment in an action brought by him against defendant Curry, and having been beaten in another action against Curry, with judgment against him for costs, brought this action to compel a set-off of one judgment against the other, the first with interest, being large enough to extinguish the second; and Curry's attorneys thereupon interposing their lien:

Held, that the statutes regulating set-offs, under which it has been decided that in an action like the present the lien of attorneys must yield to the right of set-off, having been repealed, section 66 of the Code may be invoked by the attorneys to uphold their lien.

Special Term, March, 1881.

L. B. Bunnell, for plaintiff.

Alfred Frost, for defendant Wilder.

VAN VORST, *J.*— This is an action on the equity side to set-off one judgment against another. Plaintiff, in July, 1877, recovered against the defendant Curry a judgment for \$171.61 in a district court.

Afterwards, in another action brought by plaintiff against the same defendant, in the court of common pleas, judgment was recovered against plaintiff by Curry for \$175.90, costs of the action. It is this latter judgment for costs which the plaintiff now seeks to set-off against the former.

The defendant Wilder was one of the attorneys for the

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defendant Curry in the action in the court of common pleas, and rendered all the professional services incident to the successful defense of that action.

In answer to the plaintiff's claim, the attorneys, who are made parties defendant in this action, interpose a lien in their favor upon the judgment for costs.

That they have such lien was determined by the court of common pleas in a proceeding instituted to establish it, and they were authorized to issue an execution and collect the judgment. This I should suppose was of itself a good answer to this action. But as the subject of the attorney's lien has been discussed by the parties, it is presented for decision, and the case demands that it should be disposed of.

The lien of the attorney, upon a judgment recovered by his client, for services and expenses in the action has been long recognized by the courts. But it has been decided that whenever the right of set-off is sought to be enforced by action, and not through a motion, the lien of the attorney must yield to the statutory right of set-off (*Hovey agt. Rubber Tip Pencil Co.*, 14 *Abb. P. R. [N. S.]*, 66, and cases cited).

The statutes regulating the right of set-off, upon which these decisions rest, both in equity and at law, are 2 Revised Statutes, 354, section 18; *Id.*, 174, section 40.

But these statutes have been repealed (*Session Laws of 1877*, chap. 407, p. 468), the provisions of the Code in regard to "counter-claims" taking the place of the statutory set-off (*Code*, secs. 500, 501, and note to latter section, *Bliss' Code*). The statutes having been repealed, there is no good reason why the attorney's lien should be defeated when the end is sought to be reached in an action, when it could not be secured on a motion.

Section 66 of the Code of Civil Procedure bears upon the question, and although the judgment in favor of the defendant Curry against the plaintiff is for costs only, and is not within the precise words of that section, yet I think it is within its spirit and equity, and may be invoked by the

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attorneys to uphold their lien against the plaintiff's claim in this action (*Ennis agt. Curry*, 22 *Hun*, 584). The result reached is that the plaintiff's complaint should be dismissed upon the merits, with costs.

No. 1

ALBANY OYER AND TERMINER.

THE PEOPLE agt. CORNELIUS O'REILLY.

Perjury — what constitutes the crime of — What is a valid oath.

When a party appears before an officer duly authorized to administer oaths, and hands to such officer a declaration in writing, subscribed by him, in which declaration it is stated in substance that the party subscribing the statement verifies the same by his oath, with the intention thereby of having such officer understand that he, the party, does in fact declare to him, the officer, by written and printed words, that he verifies the same by his oath; and also with the intent to have the officer subscribe his certificate, that the statement has thus been verified, and the officer believing that the party intends to declare and does declare on oath, by written and printed words, that he verifies the statement, affixes his name to the jurat; and then after such affixing delivers it to the party, who uses it for the purpose of inducing the official action of some body or court authorized to act thereon, then an oath has in fact been administered, although the words of the oath have not been audibly uttered.

Where O'Reilly, having a claim against the board of supervisors of Albany county for certain services, delivered the same and the required affidavit as to the correctness, etc., of the bill to K., a commissioner of deeds, to have the same certified by K., as sworn to before him, intending thereby to declare to said K. that by oath he intended to verify, and did verify the statement subscribed by him, and the officer regarding him as so declaring on oath, signs the certificate and the jurat for the purpose of evidencing the verification, and then delivers it to the party in that form verified, and the party presents it in that form and shape to the board of supervisors for the purpose of procuring the audit of the bill:

Held, that the oath had been duly and lawfully administered. No particular form is required for a valid administration of an oath.

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The affidavit required by section 63, page 881 of 1 Revised Statutes, (6th edition), to authorize the auditing of any account by a board of supervisors may be verified before a commissioner of deeds in and for said county.

Although there might have been legal objections to the audit and allowance of the prisoner's bill; yet, as before the bill could even be considered by the board of supervisors the law required it to be verified, the affidavit was material.

February, 1881.

Before HON. T. R. WESTBROOK, *Justice Supreme Court* ;
JAMES R. MAIN and WILLIAM J. REID, *Associates*.

MOTION in arrest of judgment.

R. W. Peckham and *M. D. Conway*, for prisoner.

D. Cady Herrick, district attorney, and *J. A. Delehanty*, assistant district attorney, for People.

WESTBROOK, *J.* — A motion is made in behalf of the prisoner, who was by the verdict of a jury rendered on Saturday last (February 26), convicted of the crime of perjury, to arrest the judgment. The crime was alleged to have been committed in verifying a bill presented to the board of supervisors of the county of Albany, in November, 1880, for his services as an undertaker in burying the bodies of several persons in his bill specified, and in preparing such bodies for interment. The several objections will be stated and considered in the order in which they were presented.

First. It is urged that the affidavit was not made before an officer authorized to administer an oath for such a purpose. It purports to be verified before Jeremiah Kieley, a commissioner of deeds in and for the city and county of Albany, and it is argued that it should have been made before the chairman of the board of supervisors.

This objection is founded upon section 63, page 881 of 1 Revised Statutes (6th edition). That section prevents the

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auditing "by any board of town auditors, or supervisors or superintendent of the poor," of any account unless the same "shall be made out in items, and accompanied with an affidavit attached to and to be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct, and that the disbursements and services charged therein have been in fact made or rendered, or necessary to be made and rendered at that session of the board, and stating that no part thereof has been paid or satisfied." The conclusion of that section is a separate sentence, and is as follows: "And the chairman of such board, or either of said superintendents, is hereby authorized to administer any oath required under this section."

We cannot regard the power conferred by the section upon the chairman of a board of supervisors as exclusive. The verification of the bill by an affidavit in a prescribed form is required, but it is not declared before whom such verification must be made. The power conferred by the closing sentence to administer oaths, is not bestowed in such language as to indicate any intention to repeal other statutory provisions. The sixty-first section (same page, etc.) expressly provides: "The chairman of any committee appointed by a board of supervisors, is hereby authorized to administer any oath to any person presenting an account or claim before such committee to be audited, as to services rendered, and the correctness of such claim." By section 39, page 446, of volume 3 of Revised Statutes (6th edition), it is declared: "Whenever any oath or affidavit *is or may be* required or authorized by law, in any cause, *matter* or proceeding (except oaths to jurors and witnesses in the trial of a cause, oaths of office, and such other oaths as are required by law, to be taken before particular officers), the same may be taken before any judge of any court of record, any * * * commissioner of deeds," etc. Such plain and explicit provisions as these cannot be repealed by the conferring of authority to take an oath upon some other officer.

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Second. It is urged that the indictment shows the nature of the services claimed to have been rendered by the accused, and that they were of a kind for which, even if in fact rendered, the board of supervisors could make no compensation, and, therefore, that the oath was immaterial.

If it were true that the board of supervisors could not allow the bill, the conclusion that the verification though willfully false would not make the party so verifying guilty of perjury, does not follow. Is it true that if a corruptly false affidavit is presented to a body or a tribunal for action to be taken thereupon, and such body or tribunal refuses to act because it rightfully concludes it is powerless to afford the relief asked, that the party who is willfully false in his evidence cannot be punished? If, upon the trial of an issue before a court, a witness swears falsely with a corrupt intent to a matter material to the issue made by the pleadings, is he to escape justice because the court rightly held that, conceding the truth of the issue as made by the pleading of the party giving the evidence, he has still failed to make out a cause of action or a defense?

The answering of these questions in the affirmative involves a construction of the materiality of evidence, in order to make a party guilty of a crime, which is unwarranted in the law. Whenever a claim is presented to a court or tribunal for adjudication, two questions are at once involved: First, are the facts, on which the claim is based, as claimed by the party? Second, conceding the truth of the allegations, do they entitle him to relief? It would be unsound to say that evidence tending to prove the allegations made would be immaterial, because, conceding their truth, there could be no recovery. If it could be said that the evidence was not material, for the reason just stated, then in any case where evidence is given of a fact which, if true, would tend to establish the issue made by the party, the individual who testified to such isolated fact could escape a conviction of perjury though his evidence was willfully false, because other

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evidence in the cause abundantly established the truth of the main issue. Clearly such reasoning would be bad, for the reason that the witness had falsely given material testimony tending to establish a cause of action, even though the main allegation of the complaint was otherwise abundantly established. When a charge of perjury is preferred, and the point is made that the evidence was not material, the test of the materiality is, did it tend to establish the issue upon which it was offered, and not was there sufficient other truthful evidence to justify the result; nor, assuming the truth of the issue to be as claimed by the party in whose behalf it is given, is the party entitled to the relief demanded. An objection may be taken to evidence offered on several different grounds, each one of which may be valid; and in such a case, it would not be accurate to say that one of such grounds was immaterial, because the others were valid and were sustained. It would certainly be true to state that the ruling would have been the same if the objection had not been made, but it would also be accurate to declare that the objection was material, for it was sound in law. Precisely this reasoning is applicable to the point we are considering. There might have been legal objections to the audit and allowance of the prisoner's bill, but as before the bill could even be considered by the board of supervisors, the law required it to be verified, it cannot be said that the oath was immaterial, because the affidavit was, in fact, material for two reasons: First, to give the supervisors jurisdiction to consider the claim; and, second, as furnishing some proof of the truth of the allegations upon which the claim was founded.

As this motion was made during a term of the court, and our attention is completely occupied with pending business, we have had no time to examine authorities. Our views, however, seem to us to be so clear on principle, that we must overrule the motion to arrest judgment.

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No. 2.

SAME agt. **SAME.**

APPLICATION in behalf of the prisoner for a certificate and *certiorari* to "stay judgment" on the indictment and conviction "until the decision of the supreme court shall be had upon" the "exceptions" taken during the trial.

R. W. Peckham and *M. D. Conway*, for prisoner.

D. Cady Herrick, district attorney, and *J. A. Delehanty*, assistant district attorney, for People.

WESTBROOK, *J.* — The prisoner has been tried and convicted by the verdict of a jury of the crime of perjury. The indictment was founded upon an affidavit subscribed by the prisoner, and purporting to have been taken before Jeremiah Kieley, a commissioner of deeds in and for the city and county of Albany, on the 24th day of November, 1880, for the purpose of verifying a bill for undertaker's services and materials, in conformity with section 63, of page 881 of volume 1 of the Revised Statutes (6th edition). Application is now made in his behalf that sentence and judgment may be delayed for a few days, so that a bill of exceptions may be prepared and settled, to the end that when so settled and signed, a certificate may be given by the judge who presided upon the trial, or by a justice of the supreme court as prescribed by section 29, page 1030, volume 3, of the Revised Statutes (6th edition).

The section to which reference has just been made provides: "Such bill of exceptions being settled and signed, if the circuit judge who tried the cause, or a justice of the supreme court shall certify on such bill, that, in his opinion, there is probable cause for the same, or so much doubt as to render it expedient to take the judgment of the supreme

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court thereon, such certificate, on being filed with the clerk of the court, shall stay judgment on such indictment until the decision of the supreme court be had upon such exceptions."

The granting of the certificate throws upon the district attorney the labor of removing the case into the supreme court by a writ of *certiorari*, and then pressing the case to a decision and conclusion (*Vol. 3 of R. S. [6th ed.], p. 1031, sec. 33*).

The language of section 29 and the effect of the certificate impress upon us the conviction that the course suggested by the counsel for the prisoner should not be adopted unless a doubt exists in our own mind as to the correctness of some ruling made by us during the progress of the trial. A knowledge that we are not infallible, and that in the hurry of a trial a mistake is liable to occur, has led us, during the few hours which a suspension of business in court has given, to re-examine the point upon which the alleged error is predicated.

That the apparent affidavit was true was scarcely pretended upon the trial. Confessedly, the prisoner claimed for services he had never rendered, and for others which, though rendered, insisting that they had not been paid for, he demanded compensation, when, beyond any doubt or cavil, he had been fully paid. The defense was not placed upon the ground of either the truth of the statement which the prisoner had made, or of any mistake honestly committed; but it was insisted and argued in his behalf that, probably with full knowledge that the account, which he had pretended at least was verified by affidavit, was wrong and false in part, he had caused not a real, but a sham affidavit to be made in order to secure thereby the sum justly and honestly due to him from a body which, as was claimed he knew, always cut down charges without regard to justice, and from whose award there was no appeal.

It is claimed that the court erred in the law governing such a defense, and in its definition of a legal and binding oath.

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The examination of the point requires a statement of what the court did say to the jury, and as accuracy in such statement is important, it is now given in its very words as recorded by its official stenographer.*

To the extract just given, in order to present with still more sharpness our instructions to the jury, it should be added that, on the request of the counsel for the prisoner, the court expressly charged that if the jury came to the conclusion there was no intent on the part of the prisoner in what he did to swear to his affidavit, then no oath was administered and their verdict should be one of acquittal.

Whatever doubts may have existed in our mind as to the correctness of a legal proposition formulated during a trial without much, if any, opportunity for examination and reflection, such doubts, after further thought, are entirely dissipated, and we now feel confident that we have not erred. Very little need be added to the reasoning given in the charge, and we, therefore, will only refer to a few authorities establishing principles on which the charge rests.

Before doing so, however, it is proper to state that we fully

* Where a party appears before an officer duly authorized to administer oaths, and hands to such officer a declaration in writing, subscribed by him, in which declaration it is stated in substance that the party subscribing the statement verifies the same by his oath, with the intention thereby of having such officer understand that he, the party, does in fact declare to him, the officer, by written and printed words, that he verifies the same by his oath; and also with the intent to have the officer subscribe his certificate, that the statement has thus been verified, and the officer believing that the party intends to declare and does declare on oath, by written and printed words, that he verifies the statement, affixes his name to the jurat; and then after such affixing delivers it to the party, who uses it for the purpose of inducing the official action of some body or court authorized to act thereon, then an oath has been in fact administered, although the words of the oath have not been audibly uttered.

To apply that rule, which perhaps is too general for you to bear in mind in your retirement, the court further charges you, that if O'Reilly delivered the bill and the affidavit to Kieley to have the same certified by Kieley as sworn to before him, intending thereby to declare to said Kieley that by oath he intended to verify, and did verify, the statement subscribed by

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agree with the propositions enunciated by the court of appeals in *Case agt. The People* (76 N. Y., 242), and with the conclusion there reached. We certainly did not intend to vary in the least from any position therein maintained, not only because the opinions of that court should control our judgment, but also because the entire reasoning of the court, as given by judge MILLER, commends itself most fully to our own convictions. The principle determined in that case is that there can be no valid oath administered unless the officer and the affiant are together. The communication must be direct between the magistrate and the party, and no signing of a pretended deposition by an individual, and the conveyance thereof by a third person to an officer, who is in a different room, or perhaps in a different building, for the purpose of affixing to the jurat his official signature, is even an approximation to that which the law requires. Personal contact and communication between the officer who administers the oath and the individual who proposes to take it are so clearly requisite that no argument is necessary to prove it. When, however, the officer and the would-be affiant are face to face,

him, and the officer regarding him as so declaring on oath, signs the certificate and the jurat for the purpose of evidencing the verification, and then delivers it to the party in that form verified, and the party presents it in that form and shape to the board of supervisors for the purpose of procuring the audit of the bill, then I charge you that the oath has been duly and lawfully administered. I do not think this rule is at all unreasonable.

For the purpose of making it clear that this is reasonable and proper, let me say a few words more. It will be conceded that if a party goes before a magistrate and declares to him in words, "I swear to the affidavit by me subscribed," and requests the officer to append to it his certificate that he has taken a proper, valid and binding oath, then such party has taken a valid and binding oath, because he has audibly proclaimed in language his intention so to do. Now that which can be proclaimed in spoken, uttered words, may be as well and as forcibly proclaimed by one to another by written and printed words. Suppose, for example, that the person about to take an oath was deaf and dumb; he could not speak, he could not hear the spoken words of another, but he could read and write, and read writing and printing — suppose such a

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and when communication is thus clearly directly established between them, thought and intent can be expressed by the one to the other, either in uttered words or in writing, and when conveyed in either way the one is as clear and as forcible as the other. An audible declaration by the affiant to the officer that he verifies a written statement by his oath, which is accepted by the latter as such, is clearly a valid administration of an oath; and a written statement, subscribed by the party and declaring the same thing, made with the intent to verify by oath, and so accepted, understood and acted upon, must be equally valid.

In disposing of the question we are considering it should be remembered that our statutes require no particular form of an oath. In *The People agt. Cook* (14 Barb., 259), MASON, P. J. (page 310), said: "The common law doctrine is that an oath taken in any form to which the affiant assents, and by which he intends to be bound, is, if administered by a competent tribunal, a valid oath (*Whart. Am. C. Law*, 185; 16 *Pick.*, 156; *Roscoe's Crim. Ev.*, 130 [ed. 1846]; 6 *Carrington & Payne*, 571; *Cowen & Hill's Notes*, 706, page 494).

person should appear before a magistrate for the purpose of administering an oath, and presents to him a written affidavit duly subscribed, the language of which is to the force and effect that the party has been duly sworn, and by his oath verifies the statement, and without uttering a word he points to the language of the affidavit and points to his signature, and then points to the certificate at the left, for the purpose of thereby indicating to the officer that he thereby authorizes him to certify that he has then been sworn, would any one doubt that would be a valid oath? That the minds of the officer and party had completely met? That there was an intention upon the part of the one to swear and of the other to administer the oath? And that, if it was then returned by the officer to the party and the party used it, that in the act of using it and giving it to the world as genuine, he was proclaiming the validity of the oath, and that in fact a good and lawful oath had been administered?

There can be, it seems to me, no doubt in the case we have supposed. Let us then apply the illustration to this. If we are correct in our supposed case then we have demonstrated that spoken words are not necessary to a valid oath, and, therefore, if a party who can read and write and also speak goes to an officer with a declaration subscribed by him, which

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It is said, however, that our statute (2 *R. S.*, 407, *sec.*, 82) has prescribed the form of administering the oath, and that it requires all persons to be sworn by laying their hands upon and kissing the gospels, unless the witness expresses a different desire.

"It was held, however, in the case of *The State agt. Whittenhurst* (2 *Hawks*, 458), that any form pointed out by the witness is binding, and he may be indicted for perjury upon it; and, they add, so he may, though he omit to make known his scruples of conscience and be sworn in the common law form, or any other binding form.

"They add, by submitting to be sworn in the common form, he makes his election, and is estopped to set up his scruples (*Cowen & Hill's Notes*, 705). It is also said in the case of *The Rex agt. Brodribb*, (6 *C. & P.*, 571) that if the oath administered was intended to be administered as binding, and was so received by the party, it is equally within the statute against perjury, whether the book on which he was sworn was a Testament or not."

When the same case reached the court of appeals (8 *N. Y.*,

declaration declares that the party has been sworn and does swear to the truth of the statement, and delivers it to the officer for the purpose of having the officer read the declaration and for the further purpose of having him understand that it is upon oath, as such party declares to him, and then asks the officer to subscribe his name to it, because he has sworn to it, is not that a valid and binding oath? If you analyze the language of the affidavit, if you interpret the meaning of the meeting and all that took place, is there not in fact and in truth as formal and as complete an oath as could be administered by spoken words, if that was the intent and design of both the parties? Would it do, gentlemen, for us to proclaim any other doctrine from this court room than this? Grant that oaths are sometimes carelessly administered, would it do to proclaim to the world that when an oath has been thus carelessly, if you please so to call it, administered, though apparently fair upon the paper, and a party comes into this court room, presenting it as a valid oath, and asks the action of this court on it and this court acts upon the faith of it—would it do, when the party is called upon to respond because of its falsity, to permit him to escape upon the ground that there was no oath, because there were no spoken and uttered words when such oath was administered?

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67) the court, per WILLARD, J. (*pages* 84, 85), said: "The oath in this case, though irregularly administered, was a valid oath. If the party taking it makes no objection to the mode of administering it at the time, he is deemed to have assented to the particular form adopted, and is liable to all the consequences of perjury as if it had been administered in strict conformity to the statute (*C. & H. Notes*, 705; *id.*, 1503; *Cody* agt. *Norton*, 14 *Pick.*, 236; *Commonwealth* agt. *Bayzell*, 16 *id.*, 153)."

This same doctrine is also contained in *Wharton's Criminal Evidence* (8th ed., sec. 354); in *State* agt. *Norris* (9 *N. H. R.*, 96), in which (*page* 102), the court say: "The term, corporal oath, must be considered as applying to any bodily assent to the oath of a witness;" in *State* agt. *Whittenhurst* (2 *Hawks' Rep.*, 458); and in 2 *Broderip & Bingham*, 284.

Assuming, then, that the law is, that no particular form is required for the valid administration of an oath, what facts were given to the jury to consider? 1st. The meeting of the prisoner and the officer for the avowed and declared purpose of verifying the account in the manner prescribed by statute. 2d. A declaration, partly printed and partly written, subscribed by the prisoner, in which he distinctly states he has been "duly sworn" and on his oath deposes. 3d. The delivery of the declaration thus subscribed to the commissioner, who reads it, and thereby is fully informed of what the prisoner states to him by written and printed words. 4th. The acceptance by such commissioner of such written and printed statement as a declaration and oath before him, expressed to the party deposing by the officer's signature to the jurat and its delivery by him, in its completed form, to the prisoner. And 5th. Its acceptance by the prisoner, as a formal and completed affidavit prescribed by law, proven by its delivery to the board of supervisors for action thereon.

With these facts properly deducible from the evidence, we are clear that no error was committed in the charge, and that the verdict of the jury was amply justified and required by

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the testimony. We are, therefore, constrained to refuse the certificate asked for, and to require that the case should be removed into the supreme court in the usual way, by writ of error after judgment.

NO. 3.

SAME agt. SAME.

March, 1881.

MOTION by prisoner's counsel for a stay of proceedings, with a writ of error.

R. W. Peckham and *M. D. Conway*, for prisoner.

D. Cady Herrick, district attorney, for People.

WESTBROOK, *J.*—The bill of exceptions prepared on the part of the prisoner, to review his conviction and sentence for the crime of perjury, has been settled and signed, and application is now made for a writ of error with a stay pending such review. The allowance of the writ is a right which must be accorded to the prisoner (3 *R. S.* [6th ed.], 1037, sec. 27), but the stay is not (*id.*, sec. 28). This proposition is not disputed by his counsel, but they insist that as the case presents a novel and important legal question, the doctrine enunciated by judge EDMUNDS in the cases of *Sullivan and Clark* (1 *Parker*, 347), and by judge WRIGHT in that of *Hendrickson* (*id.*, 396), that when the question involved is a grave one, and has never been passed upon by either "the supreme court in bank or the court of appeals," a stay ought to be granted, should apply.

Certainly every human judgment is fallible, and I am profoundly conscious that any conclusion of my own, formed during the pressure of a trial, may be erroneous, and that

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other judges, who by law review my action, may differ from and reverse me, even though my determination was reached after full deliberation. If, however, such reasoning should influence judges in allowing stays in criminal cases, then upon every conviction which had been resisted by able and ingenious counsel, justice would be postponed to the indefinite future, and such confessed uncertainty in the administration of punishment, would encourage crime to an extent which would be simply intolerable.

The cases to which counsel referred were capital, and, as in such, if the execution of judgment be not stayed, errors would be irremediable, good sense and humanity both require that the prisoner should be afforded an opportunity for review, unless the exceptions relied upon are clearly frivolous. This proposition was affirmed by myself in two cases (*Hilaire Latrimouille*, *Henry Moet*), and is sound; but such rule should not be applied to all criminal convictions, and especially to the present, because:

First. Its adoption, as has already been stated, would, by destroying all respect for the promptness of justice, stimulate and encourage crime. In *People agt. Holmes* (3 *Parker's Criminal Reports*, 507), it was said by ROOSEVELT, J.: "It will thus be seen that the prisoner has a strict right to the review, but not to the stay. The stay is a matter of discretion to be exercised only on good cause shown. Of what avail, it may be said, will be review after imprisonment has been suffered? On the other hand, of what avail, it may be asked, would be criminal trials, if in every case the execution of the sentence were to be delayed by review, at the mere option of the criminal? No man sentenced, either to death or imprisonment, would voluntarily submit. Writs of error would be universal. Promptitude and certainty, so essential to the punishment of crime, would be entirely defeated, and the whole register of criminal administration would become paralyzed." The views of the learned judge are not harsh, but eminently sound. Absolute freedom from error is impos-

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sible in a human tribunal, and even after conviction and its affirmance in every appellate court to which it can be taken, we are not absolutely sure that some ruling made upon the trial may not be technically erroneous, and that the judgment of some minds would not so pronounce it. No person can undergo criminal punishment at all unless he has been convicted in a manner known to the law, and when a conviction has been had in the highest court of original criminal jurisdiction in the state, the execution of judgment should not be deferred, unless, in the opinion of the judge to whom the application is made, there is reasonable ground to believe that error has been committed, or unless irremediable injury will be done by such execution upon a party in regard to whose actual criminality there is reasonable doubt, should the conviction be reversed. Without claiming to be infallible, my own judgment is clear that no error has been committed, and even though some technical cause for reversal should be found, the possibilities of such a result should not defer and suspend punishment, because :

Second. The moral guilt of the prisoner cannot be questioned, and the legal is almost equally clear, for by the evidence given on the part of the people, it is reasonably certain that an oath in the prescribed statute form was actually administered. His name was subscribed to a statement, partly written and partly printed, which declared that he had been "duly sworn," and on such oath verified an account against the county of Albany, and upon that statement there was also a certificate of an officer authorized to administer oaths, to the effect that the oath which the prisoner declared he had in fact taken, had been administered by such officer. This deposition signed by the prisoner, and to which he had also publicly declared he was sworn by its use to procure the audit and allowance of his claim, was indisputably, beyond doubt or cavil, willfully and corruptly false. The officer, whose name was appended to the jurat, testified that an oath was actually administered — the prisoner also, as has just been stated, so

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declared over his own signature penned by his own hand, and proof of such subscription of his name by the prisoner to the deposition, and of the signature of the officer to the jurat, without any further or other testimony, made a clear *prima facie* case, at least, and perhaps a conclusive one (*Regina agt. Turner, 2 Carrington & Kirwan, 732, 735, 736; and also note at end of case*) of the lawful administration of an oath. To all this proof, in regard to which there was no dispute, the only defense of the prisoner was an attempt to prove by some witnesses, who claimed to have been present when the alleged affidavit was signed, that there had been no formal administration of an oath in audibly uttered and spoken words. The claimed error was the charge of the court upon that defense, which instructed the jury that if the prisoner did, by written and printed words, declare to the magistrate that he was testifying on oath, with the intent so to testify, and if the magistrate's certificate of the administration of an oath was given with the understanding and belief that such a declaration on oath was made to him for the purpose of having him (the officer) so state by his official certificate, then a lawful oath had been administered. Grant, for the sake of argument, the legal inaccuracy of this charge, it is yet undeniably true that the prisoner presented a false and fabricated bill against the county of Albany, which the positive testimony of the commissioner of deeds and his own subscribed statement proved, was in fact formally verified by an oath legally administered, and that, therefore, he is probably legally and certainly morally, deserving of punishment. In such a case there should be no stay to enable the prisoner to see if, by some technicality, he may not escape that desert which every right-minded person will declare to be richly his due.

Third. It is said that the charge enunciated a new rule of law. It would, I think, be more accurate to say that an old rule of law was applied to a case in which application no reported adjudication, yet found, has either approved or condemned it. Certainly the cases cited in a former opinion

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abundantly establish that forms in oaths are immaterial, and that any form to which a party assents as binding is valid. Mere intention to swear, without any declaration, is certainly ineffectual. But a declaration by a person to an officer authorized to administer oaths audibly uttered, that on his oath he deposes to the truth of certain facts stated to the officer is, when made and certified to by such officer for use in a proceeding authorized by law, a valid and legal oath; and as a declaration may be made as well by written as by spoken words, it is impossible, it seems to me, to read the document to which the prisoner has appended his name, and the jurat to which the officer has subscribed his official signature, with a knowledge of the conceded fact that each name was written when the two were in personal contact for the purpose of having the same verified by the former, without reaching the conclusion that an oath binding in law was, in fact, administered. The delivery of the written and printed deposition, signed by the prisoner in his own name and by his own hand, to an officer to be certified as sworn to was a declaration — as perfect and complete as though audibly uttered, or written upon a separate paper and subscribed by the prisoner — by the former to the latter that he (the former) regarded himself, to use his very words, as “duly sworn,” and what he assented to as an oath is one in fact and in law. The only error in the charge, if any, was in its leaning to the prisoner. The jury was instructed that if the prisoner did not intend by what he did to take an oath then he had not been sworn, or to use other words, if he intended openly to declare he was sworn, whilst mentally he was shamming and lying to the officer, so that he might obtain an official certificate of the lawful administration of an oath, in order to defraud the taxpayers of Albany county, then by such mental intent he could escape the legal consequences of his morally criminal conduct. In my judgment this charge was too unfavorable to the people. That which a party declares to an officer or court is an oath, and so declares for the purpose of inducing official action

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thereon, should always be so treated, and he should not be allowed to escape justice by the technical plea that he did not intend an oath binding on his own conscience but only intended to make the court or officer who accepted it as such so believe.

The rule of law as contained in the charge really gives to a person an opportunity to lie for his own advantage in judicial and other proceedings without the consequence of punishment, and without the restraining influence of the fear thereof upon the conscience. The jury should, therefore, have been instructed that if the prisoner did declare to the commissioner of deeds by either written, printed or spoken words, or by signs, that on his oath he verified the statement by him subscribed, with the intent to have the officer so believe in order to procure the latter's certificate of the lawful administration of an oath, to be used for a purpose authorized or required by law, and the officer, having thus been induced to believe that the affiant was sworn in a manner binding upon his conscience, gave to him such a certificate, which the affiant used for a purpose in which the law required or authorized the use of an affidavit, then they should, for the purposes of that trial, regard the prisoner as having been regularly and legally sworn. In other words, perjury can be committed by willfully false statements made either by speech or writing, or by signs, to an officer or court authorized to administer an oath, if given under what the party declares by words or signs to such court or officer to be a form and manner of its administration binding upon his conscience, and which is so accepted and received, even though the party did not in his heart and conscience intend to take one. The instruction to the jury covered this and more. It was important for them to find an intent of the prisoner to make the officer believe that the former regarded himself as sworn in a manner obligatory upon his conscience, but it was not important to find that he really regarded himself as under the obligation of an oath. In finding such intent, the written and printed declaration subscribed by the prisoner — to the jurat upon which he had obtained by his

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request personally communicated, the officer's signature, which was placed thereon in his presence, and he, by silent acquiescence, at least, if not by words, assenting to the truth of the statement signed by the officer that an oath had been administered — was important testimony to be considered. They could not fail to remember that conceding the absolute truth of all that the prisoner sought to prove on the subject of the administration of an oath, still it was indisputable, upon the testimony of his own witnesses, that he had sought the commissioner to have an affidavit taken for use in a proceeding in which the law required one; that the two being together, the prisoner declared to the commissioner, by a written and printed declaration formally subscribed with his own name by his own hand, that he was making before him a deposition on oath, to which fact he wished the commissioner to certify; that the commissioner, to whom such declaration was thus made and such wish expressed, accepted the written and printed words so subscribed in lieu of an audible utterance by the prisoner to him of words of similar import, of which acceptance he distinctly informed the prisoner, by appending his official signature to the jurat in the presence of such prisoner; that the delivery of the subscribed declaration which stated to the officer that the prisoner on oath deposed to its truth, with a request that it should be certified as sworn to, and the giving of such certificate at his request, was in fact the verification thereof by an oath administered; and that the document having thus become both in form and substance a completed affidavit, was used by the prisoner in a legal proceeding in which he knew it would surely be regarded as valid, and that such use by the prisoner thereof was an additional and a clear proclamation by himself that he had in fact been duly and regularly sworn. What inference did these undisputed facts require from the jury, or from any tribunal to which they were submitted? Can the words, which the affidavit and certificate contain, and which (the handing of the document from the one to the other, as each

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had subscribed his name to his own statement, clearly shows) were exchanged between the commissioner and the affiant when they were in personal contact, be expunged? It was well said by DAVIS, J., in *Matter of Haller* (3 *Abbott's New Cases*, 65), in deciding what was a solicitation of alms under our statute, that "in many instances words are far less effective to accomplish the end than simple acts." Bearing this truism in mind, can, it may also be asked, not only the words which the deposition contains, but also all the attending circumstances of the interview between the prisoner and the commissioner be made meaningless upon the theory advocated by counsel that the prisoner intended not to swear but to cheat and deceive the officer, and thereby procure a certificate of the lawful administration of an oath obligatory upon his conscience, in order that without the risk of punishment for perjury he might defraud an already burdened public? Such reasoning does not commend itself either to the judgment or to the conscience. Men's intents and purposes must, in the administration of oaths for judicial and other legal proceedings, be judged of by what they do and by what they say, either in spoken or written words or signs, and not by their concealed and unuttered mental purposes and reservations. To hold otherwise is opening wide a door for fraud and wrong to enter.

The discussion of this question ought not to be closed without a statement of the inevitable consequences to individuals and to the public, both in reference to past and future transactions, provided the rule enunciated upon this trial as governing the administration of an oath be held to be erroneous. Justice is every day administered upon the faith of papers supposed to be affidavits, because, like the one to which the prisoner appended his name and procured the certificate of the officer, they seem to be regular and valid. Very often parties cause their own affidavits to be presented, and upon them ask for judicial or other action authorized by law. Upon the assumption of the regularity of the oath, which

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the face of the papers declare, most important questions have been and are continually determined. Titles have been passed, and orders granted, in which affidavits are required to give jurisdiction, involving immense values. All these are liable to be overturned and invalidated, provided that which the prisoner claimed to be the law regulating the administration of an oath is correct. Not only will much of past action be rendered nugatory, but in all future administration of justice the danger of such a result will compel courts and officers to require the personal presence and examination of all parties and persons, whenever proof must be made by affidavit to justify action. In no other way will there be safety in legal procedure or certainty in the administration of justice, for thousands of affidavits in the past have been and as many more in the future will be taken precisely as the defense claimed that of O'Reilly was. Common practice has sanctioned what is now claimed to be illegal, and an analysis of what must necessarily occur under such circumstances shows, as has been demonstrated, every necessary ingredient of an oath actually taken. Neither reason nor justice requires the adoption of the principle claimed by the defense, and the serious consequences, which are sure to follow from any such rule of law if adopted, should cause a court to hesitate in giving to it its sanction.

For the reasons which we have stated, the application for a stay of proceedings is denied.

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U. S. CIRCUIT COURT.

STEELE MACKEY agt. MARSHALL H. MALLORY and GEORGE S.
MALLORY.

Removal of cause — Power of United States court to remand cause — When such power to be exercised — When the allegations of the removing party in the petition must prevail.

Under the provision of section 5 of the act of March 3, 1875 (18 U. S. Statutes at large, 472), there is no doubt of the power of this court to remand a cause at any time before a formal trial of the plenary issues in it, whenever it appears that the court has no jurisdiction of the suit. But the provisions do not require the court to remand the suit unless it appears that the suit does not involve a controversy properly within its jurisdiction. If the suit appears, on the removal papers and the prior record taken together to be a suit properly removable, it is not to be remanded if the question arises solely on those papers. It is the practice of the courts of the United States under the act of 1875, to try the question of jurisdiction on a motion to remand, and before the plenary trial.

For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the court must act in declaring the law upon the question it presents. The record in the state court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes.

Where an action is brought by A. in a state court against B. and C. to obtain an adjudication that a contract made between A. and B. has been rescinded, and a reconveyance to A. of a certain play and a certain invention, which play and invention had been assigned to B., and for an accounting and an injunction to restrain B. from exhibiting said play or using or assigning said invention; and where the complaint states C. is made defendant by reason of his having obtained from B. an interest in said property and assets, and by reason of his having or claiming such interest adverse to the plaintiff :

Held, denying a motion to remand the case after its removal to this court, upon petition by B., before any answer was put in by either defendant, such petition setting forth that plaintiff is a citizen of the state of New York, while petitioner is a citizen of Connecticut, declaring that the alle-

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gations in the complaint as to C. are untrue, that the record before the court shows jurisdiction, and that the allegations of the removing party in the petition must, at this stage of the case, prevail.

Southern District of New York, April, 1881.

F. N. Bangs, for plaintiff.

James C. Carter, for defendants.

BLATCHFORD, *J.* — This suit was brought in the court of common pleas for the city and county of New York. The complaint therein sets forth in substance that in July, 1879, the plaintiff and the defendant, Marshall H. Mallory, made a written contract, under which the former was to devote himself to the service of the latter as author, manager, actor, director, or in any other capacity having any connection with theatrical labor; and the entire product of his labor and skill, and all copyrights and patents therefor, and all income therefrom, or from any play or invention of the former, and from the use of any of the services of the former anywhere, in any such capacity, were to be the exclusive property of the latter; and such copyrights and patents and income were to be assigned and paid to the latter; and the former made certain covenants to secure said results; and the latter agreed to pay to the former an annual salary of \$5,000, in equal monthly installments, and also agreed that if the profits of the enterprises in which the services of the former should be employed by him should be equal to twice the amount of money, with interest, expended by him thereon, or if the amount so expended should be less than \$30,000, when such profits should equal the amount so expended by him, with interest, and \$30,000 in addition, then such annual salary should be increased by a sum equal to one-fourth of the net profits produced in each year thereafter from said enterprises; such agreement to continue for ten years, with provisions for a renewal of it or for a termination of it at the end of any year, at the option of the latter and for certain benefits to the

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former, under certain circumstances, on such termination; that the plaintiff has fully performed said contract; that he assigned to M. H. Mallory the copyright of a play called "Hazel Kirke," of which he was the author, and the exclusive right to a mechanical device, of which he was the inventor, called the "double stage," secured to him by letters patent of the United States; that said copyright and patent were of large value; that M. H. Mallory invested money in fitting up a theatre in New York, and in equipping a second company to present said play elsewhere, and in purchasing theatrical properties, which still exist and have a money value; that the said play and "double stage" have been used by M. H. Mallory in New York, in connection with each other, over 300 consecutive times, and said play has been performed elsewhere over one hundred times, and therefrom M. H. Mallory and the defendants have received large sums of money, out of which the current expenses of the performances have been paid, the receipts largely exceeding the expenses, and they have in their possession, as owners, property representing their investment, of the value of over \$80,000; and they have realized in money more than \$80,000 over all current expenses; that it was the duty of M. H. Mallory and the defendants, under said contract, to keep accounts of all moneys invested or expended thereunder, and of all moneys received from business transacted thereunder, and give to the plaintiff transcripts thereof or permit him to inspect them; that in May, 1880, said agreement was modified so that thereafter the salary of the plaintiff was to be \$150 per week, and so that he should have five per cent per month and five per cent per annum of all profits above current expenses, instead of the twenty-five per cent; that in July, 1880, and since, the plaintiff has applied to the defendants for an account of the receipts and expenditures of moneys under said agreement, but they have refused to render him any account, save two scraps of paper, which are set out; that said scraps, as statements of account, are false, crediting to

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the defendants moneys not expended; that in keeping their accounts, the defendants have omitted to set down as profits or earnings certain items named, which ought to be taken in account in determining the results and profits of the business; that since December 8, 1880, the defendants have refused to pay to the plaintiff a salary of more than \$100 a week; that they have neglected to perform said agreement in other matters set forth, and have given themselves an erroneous specified credit; that some time after the making of said contract, and during the happening of the matters above stated, the defendant G. S. Mallory obtained from M. H. Mallory an interest in said contract and in the property and assets which had been accumulated by said M. H. Mallory under the operation of said agreement, and G. S. Mallory now has, or claims, such interest adverse to the plaintiff; that said play and said patent have no established market value, and it would be difficult, if not impossible, to estimate in money the plaintiff's loss by M. H. Mallory's having assigned said copyright and said patent, and that any compensation or indemnity to him for the breach of said contract would be inadequate which did not involve the restoration to him of said copyright and said patent; and that the plaintiff elects to treat said contract as rescinded and no longer obligatory upon him. The complaint prays for judgment: (1) That the contract has been rescinded and is no longer obligatory upon the plaintiff, and that he be restored to all he has lost thereby; (2) that said copyright and said patent be reassigned to him, or, if that is impracticable, that the defendants pay the value thereof to him, or such value be accounted for as profits realized under said agreement; (3) that an account of said profits be taken, and the plaintiff recover his lawful proportionate share thereof; (4) that the defendants be enjoined from exhibiting said play or assigning said copyright; (5) that they be enjoined from using said mechanical device or invention; (6) that a receiver be appointed of said play and invention and patent.

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Both of the defendants appeared by attorney on January 13, 1881. On the 22d of January, 1881, before any answer was put in by either defendant, H. M. Mallory presented to the state court a petition, setting forth that the plaintiff was, at the time of bringing the suit, and still is a citizen of New York, and the petitioner was, at the time of the bringing of this suit, and still is a citizen of Connecticut, and G. S. Mallory was, at the time of the bringing of the suit, and still is a citizen of New York; that the suit is one "in which there is a controversy which is wholly between citizens of different states, to wit, the plaintiff, a citizen of New York, and this petitioner, a citizen of the state of Connecticut, and which can be fully determined as between them, and in which controversy this petitioner is actually interested, and in which he is the only defendant actually interested; that, so far as it relates to him, the said suit is brought for the purpose of restraining and enjoining him, and is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendant as a party in the cause; that said action or suit is brought by the plaintiff therein to obtain an adjudication that a contract made between plaintiff and this petitioner has been rescinded, and a reconveyance to the plaintiff of a certain play known as 'Hazel Kirke,' and of a certain invention, which said play and invention had been assigned to this defendant by the plaintiff by and in pursuance of said contract, and for an account of profits under said contract, and for an injunction restraining this defendant from performing or exhibiting said play or using the said invention, and for a receiver of said play and invention; that the defendant George S. Mallory, as appears from the complaint in said action, is made a defendant therein by reason of his having obtained from this petitioner an interest in said contract, and in property and assets which had been accumulated by this petitioner under the operation of said contract, and by reason of his having or claiming such interest adverse to the plaintiff; but this

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petitioner says that said allegations of said complaint respecting said George S. Mallory is wholly untrue, and that said George S. Mallory has not and never has had any interest in said contract or in said property or assets so alleged to have been accumulated, and has never received any of the profits arising from the enterprises mentioned in said contract ;” and that the petitioner “desires to remove the said suit, or to remove the same as against your petitioner, into the circuit court of the United States for the southern district of New York.” On this petition, and a bond, the defendant M. H. Mallory moved in a state court, on notice to the plaintiff, that the court accept said petition, bond and surety, and proceed no further in the action or no further therein against him. The motion was opposed by the plaintiff and the court denied it, and ordered “that the court do proceed in the action.” In assigning the reasons of its action, the court (J. F. DALY, J.) held that it was its duty to examine the right of removal; that, as the right of removal depended on the nature of the controversy, such right must be determined by an inspection of the complaint as the only pleading then before the court; that the petition for a removal was not a pleading, and could not vary the cause of action stated in the complaint; that the defendant could not use his petition as a pleading to raise an issue with the plaintiff on the allegations of the complaint, and show a controversy entitling him to remove the cause; that the denial in the petition as to George S. Mallory did not show the controversy to be one wholly between the petitioner and the plaintiff; that if the complaint states a cause of action which can be determined only when all the parties to the action are before the court, a denial by one of the defendants of the facts set forth in the complaint does not sever the controversy as to him nor show that the cause may proceed as against himself without the presence of the other defendant; that an injunction is not the sole object of the action as respects M. H. Mallory, as required by subdivision 2 of section 639 of the Revised Statutes of the United States; that under

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that subdivision there cannot be a final determination of the controversy, so far as concerns him, without the presence of G. S. Mallory as a defendant under the allegations in the complaint; and that under section 2 of the act of March 3, 1875 (18 *U. S. Stat. at Large*, 470), there is not a controversy which is wholly between the plaintiff and M. H. Mallory, and which can be freely determined as between them, for the reason that on the complaint, the plaintiff has no controversy with M. H. Mallory separate from G. S. Mallory.

There has been filed in this court, on the part of one or both of the defendants, a copy, certified by the clerk of the state court, of the record of that court. The plaintiff now moves in this court to remand the cause to the state court. The motion is opposed by counsel for M. H. Mallory. It is contended by him that the question of the existence of the facts on which the right of removal depends is an issuable question, which can be determined only in this court, and cannot be finally determined here on this motion, but only on a regular trial hereafter; that for the purposes of a removal, nothing can be permitted to contravene the allegations of the petition in the particulars in which those allegations deny the allegations of the complaint as to the interest of George S. Mallory, or in the particulars in which a case within the removal statutes is affirmatively stated in the petition; and that, as the petition states that the suit is brought for the purpose of restraining or enjoining M. H. Mallory, that is sufficient under said section 639, although the complaint asks an injunction against G. S. Mallory also. The principal contention on the part of the defendant is that in this case the question whether the controversy between the plaintiff and M. H. Mallory can be determined fully and finally as between them, without the presence of G. S. Mallory, can be decided only on the final trial in this court on all the evidence to be taken; that as on the allegations of the petition, the controversy may be one which, so far as concerns M. H. Mallory, can be determined without the presence of G. S. Mallory, the case must

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be retained by this court until it shall finally decide that matter; that this court cannot grant this motion unless it can certainly see now that G. S. Mallory has such an interest that it is clear the controversy, as between the plaintiff and M. H. Mallory, cannot be determined without the presence of the other defendant; and that, in respect to the inconsistency between the allegations of the complaint and those of the petition, the latter must control, or else the case can never reach that stage where the matter can be definitely determined by this court. Succinctly stated, the view urged is that where the removal depends on the nature of the controversy, in respect to the necessary parties to it, the nature of the controversy is not dependent on the shape which the plaintiff gives to the controversy when it is developed by the proofs; that when the petition for the removal avers the existence of such a controversy as would, if the allegation were true, authorize a removal, and the petition admits nothing stated in the complaint, and takes notice of nothing in it except to controvert it, the state court must cease from its jurisdiction; and that, where there is a conflict between the complaint and the petition, the petition alone must be regarded. In support of these views it is suggested that when the case is fully developed by the proofs, it may turn out that there is in it a controversy between the plaintiff and M. H. Mallory, to which G. S. Mallory is not, and never was, a proper party; that such a state of facts will show that M. H. Mallory, at the time he presented his petition for removal, had a right to remove the suit; and that, if not now allowed to remove it, his formal proceedings being regular, it will then appear that he has been deprived of a right.

In *Denniston agt. Draper* (5 *Blatchford C. C. R.*, 336) it was held by this court that where the defendant had taken proceedings under section 3 of the act of March 2, 1833 (4 *U. S. Stat. at Large*, 633), to remove into this court a suit brought in a state court, the removal was inoperative if the proceedings were in conformity with the act; that the ques-

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tion whether the defendant had, in fact, a right to remove the suit, could not be raised by a motion to this court, before the trial, to remand the cause to the state court; and that any question as to the jurisdiction of this court in the premises, based on the point of an alleged absence of right in the defendant to remove the suit, could be raised at the trial.

That was an action of replevin, brought in the state court, to recover the possession of cotton. The defendant removed the case, under the act of 1833, by *certiorari*, claiming that he was in possession of the cotton, as an officer, under the revenue laws of the United States. The plaintiff moved to remand the cause on affidavits alleging that the defendant was simply a tortfeasor. The motion was denied on the view that it was not proper, if it was competent, for this court to determine, upon motion, the disputed jurisdictional facts involving the right or legality of the removal, and that the proper place to hear and determine them was on the trial. The same view was held by Mr. justice NELSON in *Fisk agt. Union Pacific Railroad Company* (8 *Blatchford C. C. R.*, 243).

Those cases were prior to the enactment of section 5 of the act of March 3, 1875 (18 *U. S. Stat. at Large*, 472), which provides that if, in any suit removed, it shall appear to the satisfaction of the circuit court, at any time after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, the circuit court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed as justice may require. Under this provision there is no doubt of the power of this court to remand a cause at any time before a formal trial of the plenary issues in it, whenever it appears that the court has no jurisdiction of the suit. In fact, the statute is imperative that whenever such want of jurisdiction appears the court shall dismiss or remand the suit. But the provisions do not require the court to remand the suit unless it appears that the

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suit does not involve a controversy properly within its jurisdiction. If the suit appears on the removal papers and the prior record, taken together, to be a suit properly removable it is not to be remanded, if the question arises solely on those papers, as it does in this case. This view does not affect cases like *Galvin agt. Boutwell* (9 *Blatchf. C. C. R.*, 470) and *Heath agt. Austin* (12 *id.*, 420), where, even before the act of 1875, the question of citizenship was tried on affidavits in this court on a motion to remand. The same thing was done after the act of 1875 in *Sawyer agt. Switzerland Marine Insurance Company* (14 *id.*, 451). It is the practice of the courts of the United States, under the act of 1875, to try the question of jurisdiction on a motion to remand and before a plenary trial. In *Gold Washing Company agt. Keyes* (6 *Otto*, 199) the circuit court did this and remanded the cause, and the supreme court, on a writ of error taken under section 5 of the act of 1875, affirmed the judgment of remand on the ground that on the pleadings in the state court and the petition for removal taken together, the jurisdiction of the circuit court did not appear. The same course was taken in *Bible Society agt. Grove* (11 *Otto*, 610) and in *Jifkins agt. Sweetzer* (1 *Morrison's Transcript*, 109.) The question of jurisdiction was not left to be tried at the formal trial of issues raised by the pleadings. The question to be determined on this motion is whether the record before this court shows jurisdiction or a want of jurisdiction.

In *Gold Washing Company agt. Keyes*, above cited, it is said: "For the purposes of the transfer of a cause, the petition for removal which the statute requires performs the office of pleading. Upon its statements, in connection with the other parts of the record, the court must act in declaring the law upon the question it presents." Again, "the record in the state court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes. If it is not, and the omission is not afterwards supplied, the suit must

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be remanded." Certainly the petition in this case shows a remarkable case under the act of 1875, because it avers that the allegations of the complaint respecting G. S. Mallory are untrue, and that he has not and never has had any interest in the subject-matter of the suit. Even taking into view the complaint with the petition, it does not appear that this court has not jurisdiction of the suit. For the purposes of a removal, the allegations of the removing party in the petition must, at this stage of the case, prevail, and the suit must, for the present, be retained in this court.

N. Y. COMMON PLEAS.

CHARLES G. WEBBER, respondent, agt. CHARLES H. TRUAX,
as assignee, appellant.

Appeal by defendant from order of marine court general term, setting aside verdict as against the weight of evidence--Result of--Danger of appealing from such order.

Where an appeal is taken by defendant, upon stipulation, from an order of the general term of the marine court, setting aside a verdict as against the weight of evidence:

Held, that there being a controverted question of fact involved to go to the jury, judgment absolute must be given against the defendant.

The result of this appeal shows the danger of appealing from such an order.

General Term, April, 1881.

C. S. Truax, for appellant.

P. & D. Mitchell, for respondent.

VAN HOESEN, *J.*—The general term of the marine court set aside the verdict as against the weight of evidence, and

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the defendant appealed from the order and gave the requisite stipulation. If upon the uncontroverted facts the defendant is not entitled as matter of law to judgment in his favor, judgment absolute must be rendered for the plaintiff. The question raised by the pleadings and litigated before the court below is, was the assignment by Neil McCallum & Co., to the plaintiff, of the claims which form the subject of this action, made in fraud of the creditors of Neil McCallum & Co.? It cannot be said that the evidence on either side leaves the question free from doubt. The jury took one view of the evidence and the marine court, general term, another, and the difference was owing entirely to the fact that what the jury regarded as suspicious circumstances seemed to the general term as devoid of any taint of fraud, and that the witnesses whose testimony the jury rejected were credited by the general term. The counsel for the defendant did not, at the trial, ask the court to direct a verdict in his favor, but that is in effect what he now asks us to do, for he says virtually that there was nothing to go to the jury, and no question of fact to be determined. We think that there was and is a serious question of fact involved, and the result is that we must affirm the order appealed from, and order judgment absolute against the defendant, with costs.

The danger of appealing from an order granting a new trial on the ground that the verdict is against the weight of evidence, is proved by the result of this appeal (*Harris* agt. *Burdett*, 73 N. Y., 136).

Lanphire agt. Slaughter.

HERKIMER COUNTY COURT.

JAMES E. LANPHIRE, respondent, agt. WILLIAM R. SLAUGHTER,
appellant.

Parol evidence — Varying or modifying a written agreement — When to be admitted.

This action was brought to recover \$150, rent due for the use and occupation of a cheese factory, under a written lease which provided for the use and occupation by the defendant, and in consideration thereof he promised to pay the installment of rent which is the subject of the action. The lease is silent upon the subject of repairs, and contains no agreement on the part of the plaintiff whatever upon that subject. Defendant set up a counter-claim as a defense, alleging in substance that at the time of the execution of the lease and in consideration thereof the plaintiff promised and agreed to and with the defendant to make certain repairs, and that pursuant to said agreement plaintiff did commence such repairs but did not complete them, and that defendant completed the said repairs that the plaintiff promised and agreed, but neglected so to do, to defendant's damage of \$200. Defendant offered to prove that an agreement distinct from, but collateral to the lease offered and received in evidence, was made by and between the parties to this action respecting certain repairs that were to be made in and about the cheese factory leased to this defendant, which was rejected : *Held*, that the evidence should have been received.

The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply to a collateral undertaking. Such fact is always open to inquiry, and may be proved by parol.

April, 1881.

APPEAL from a judgment rendered by a justice of the peace, where the respondent had a judgment for \$150 and costs of the action.

The facts are sufficiently stated in the opinion of the court.

E. J. Coffin, for appellant.

C. A. Moore, for respondent.

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AMOS H. PRESCOTT, *County Judge*—The plaintiff and respondent brought this action in the court below to recover the sum of \$150 rent due for the use and occupation of a cheese factory, situated in the town of Fairfield. The lease between the parties is in writing and signed by the defendant, the lessee, and is not signed by the lessor, the plaintiff. By the terms of the lease the sum of \$150 had become due to the plaintiff, prior to the time of the commencement of the action, for the use and occupation of the premises.

The lease provides for the use and occupation of the cheese factory by the defendant, and in consideration thereof he promised to pay the installment of rent, which is the subject of the action.

The lease is silent upon the subject of repairs, and contains no agreement on the part of the plaintiff, whatever, upon that subject.

The defendant set up a counter-claim as a defense, alleging in substance that at the time of the execution of the lease, and in consideration thereof, the plaintiff promised and agreed to and with the defendant to make certain repairs in and about the cheese factory, and that pursuant to said agreement the plaintiff did commence such repairs, but did not complete them, and that the defendant thereupon completed the said repairs that the plaintiff promised and agreed, but neglected so to do, to defendant's damage of \$200.

On the cross-examination of the plaintiff he was asked the following question: "At the time the said lease was drawn was there any talk between you and defendant as to certain repairs that were necessary to be made in and about said factory, in pursuance of said Slaughter (defendant) entering into possession of the same?"

Plaintiff objects as incompetent, immaterial—cannot add to or vary the written instrument. Objection sustained and defendant had an exception.

The defendant then offered to show by the same witness that an agreement distinct from, but collateral to the lease

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offered in evidence by the plaintiff, was made by and between the parties to this action respecting certain repairs that were to be made in and about the cheese factory leased to this defendant. Overruled ; defendant excepts.

The lease was received in evidence, and a copy of the same is contained in the return. Upon the subject of the repairs there is nothing whatever contained in the written lease.

The question, and the only question which exists in the case is as to whether or not error exists in consequence of the rulings of the justice, holding in substance that the defendant could not give the necessary evidence to support the counter-claim, because it added to or varied the written lease.

The position of the appellant is in substance this : That at the time of the execution of the lease put in evidence, and upon which this action was brought, and in consideration thereof the plaintiff, the lessor, entered into an agreement with the defendant, the lessee, distinct from, but collateral to, the lease in question, in which he agreed to put the cheese factory in order, etc.

We regard the recent case of *Chapin agt. Dobson* (78 N. Y., 74) as settling this question adverse to the respondent in principle. That was an action brought to recover the value of certain machinery. There was a written agreement in regard to the price of the machinery, etc. The defendant set up as a defense a parol agreement made at the same time that the written agreement was executed, and in consideration of said purchase, etc. That the said plaintiff guaranteed to the defendant that the machines would work well, and to the satisfaction of the defendant, and in case of their failure so to do, that the plaintiff would take them back.

On the trial evidence was offered to prove the defense. The plaintiff objected on the ground that in substance the agreement was embodied in the writing which could not be varied by oral evidence. The objection was overruled and the plaintiff excepted.

The case upon this question was carried to the court of

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appeals, and that court unanimously held, DANFORTH, J., writing the opinion, "that the rule prohibiting the reception of parol evidence varying or modifying a written agreement, does not apply where the original contract was verbal and entire, and a part only was reduced to writing. *Nor does it apply to a collateral undertaking.* These facts are always open to inquiry and may be proved by parol."

The prior decisions upon this question are referred to, including cases where written contracts or leases had been made, and the court decide and lay down the broad rule that in all similar cases parol agreements may be pleaded and proved as a defense or counter-claim.

The case of *Wilson agt. Deen* (74 N. Y., 531), is referred to as holding a contrary doctrine, but the court distinguish it and say: "There the plaintiff sought to cancel a lease upon the ground that the defendant failed to perform an oral agreement concerning a matter embraced in and covered by its terms. It was held that this case was directly within the general rule above stated, and the court advert to the fact that it was not claimed to be within the principle which upholds an oral or parol agreement when collateral to a written instrument, and say if it had been so claimed it would have been unavailing as in such a case the only remedy would be an action for damages for the breach of the parol contract."

We refer to this case for the purpose of learning what the court in the case first cited intended to decide.

It seems, therefore, that any decisions that had previously been made, holding any different doctrine from the rule laid down in the case of *Chapin agt. Dobson* (*supra*) is overruled, and this decision should hereafter govern. Applying, therefore, the principle of this carefully adjudged case, the result follows that the evidence offered in this case should have been received, and for this error the judgment of the court below is reversed.

Neugent agt. Swan *et al.*

SUPREME COURT.

JOHN NEUGENT agt. AMOS L. SWAN *et al.*

JAMES YOUNG agt. WM. W. CAMPBELL and others.

Reference — to ascertain the damages caused by an injunction — When to be had — What is a final determination, that plaintiff was not entitled to such injunction.

A reference to ascertain the damages caused by an injunction can only be had when there has been a final determination that the plaintiff was not entitled to such injunction, or something equivalent to such a determination.

That the injunction was dissolved on motion, pending the action, is not enough, as that may have been done for various reasons in no way affecting the merits, and yet the court might, at the final hearing, decide that the defendant ought to be enjoined.

Where by supplemental answer, the defendants were allowed by the court to make so sweeping a change in the issue as to aver a fact which occurred after the injunction was dissolved, and in effect not only changed the plaintiff's right to the relief sought, but practically deprived him of it and defeated the object of the action, or rendered it of no value, and as a condition allowed the plaintiff to discontinue without costs, which he did:

Held, that there had not been a final determination by the court, or what was equivalent to one, that the plaintiff was not entitled to the injunction when granted, and that the defendants were not entitled to a reference.

Where a like supplemental answer had been allowed and served, and the action was thereafter ended by what was, in fact, a discontinuance by the consent of the parties and so intended, although it took the form of a dismissal of the complaint:

Held, that the same principle should control as if formally discontinued by consent.

Broome Special Term, May, 1881.

S. A. Bowen, for motion.

J. E. Dewey, opposed.

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MARTIN, J. — This is a motion for a reference to determine the damages sustained by the defendants by reason of an injunction granted in this action. The temporary injunction granted herein was dissolved upon motion, and this action was subsequently discontinued under the following circumstances: The defendants asked leave to interpose a supplemental answer setting up the fact that the tax, the collection of which the plaintiff, by this action, sought to restrain, had been actually collected by the defendants after the commencement of the action and after such injunction was dissolved. The court gave the defendants leave to interpose such supplemental answer but upon the express condition that the plaintiff should also have leave to discontinue the action, without costs, if such supplemental answer should be served. It was served, and the plaintiff availed himself of the condition so imposed by discontinuing the action.

The question presented by this motion then is, has there been, in this case, such a final decision by the court that the plaintiff was not entitled to such injunction as to constitute a breach of the undertaking given upon the granting of such injunction? I do not think that the order dissolving such injunction can be regarded as a final determination that the plaintiff was not entitled to such injunction. "An order made pending a suit dissolving a temporary injunction by no means determines that the party in whose favor it has been granted may not be entitled to that relief at the final decision of the cause. It may be dissolved for irregularity, or because the case is badly stated in the complaint, or upon the answer of the defendant and affidavits, and yet at the final hearing it may be decided that the defendant ought to be enjoined" (*Methodist Churches of New York* agt. *Barker*, 18 N. Y., 465).

Nor do I think that there has been any such voluntary abandonment of this case by the plaintiff as to render the decision of such motion a final decision that the plaintiff was not entitled to such injunction. This case is unlike the cases of *Carpenter* agt. *Wright* (4 Bosw., 655) and *Coats* agt. *Coats*

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(1 *Duer*, 664), cited and relied upon by the defendants. In those cases the actions were abandoned by the plaintiffs presumably in consequence of decision of the court dissolving the temporary injunction therein. But here the defendants were allowed by the court to change the original issue in the action by alleging a fact occurring after the injunction was dissolved by inserting an allegation which, in effect, not only changed the plaintiff's right to the relief demanded by him but it also rendered such relief practically of no value. As a condition to allowing the defendants to make this sweeping change in the issue the court gave the plaintiff the right to discontinue, without costs, which he did. Here was a new condition of things which had arisen since the granting of such injunction and since its dissolution, and it was in view of this new condition of the case that the plaintiff was allowed to discontinue such action, without costs.

I am of the opinion that the defendants having availed themselves of the provisions of the order allowing supplemental answer, they must be deemed to have accepted and assented to the conditions upon which it was granted, and consequently must be regarded as having consented that the plaintiff might discontinue such action without costs upon the service of such supplemental answer. The facts of this case would not, I think, justify me in holding that there had been a final adjudication by the court, or what was equivalent to a final adjudication that the plaintiff was not entitled to the injunction order granted him when granted (*Palmer agt. Foley*, 71 *N. Y.*, 106; *Benedict agt. Benedict*, 15 *Hun*, 305; *affirmed*, 76 *N. Y.*, 600). Therefore this motion must be denied, but without costs to either party.

In the case of *Young agt. Campbell*, a similar motion was made at the same time. The discontinuance or dismissal of the complaint therein was in fact a discontinuance by the consent of the parties, and was, I think, within the principle of the decision in the *Neugent case*; and the motion in this case should also be denied without costs to either party.

Franklin agt. Hayward *et al.*

SUPREME COURT.

SUSAN S. FRANKLYN and HENRY DAY agt. JOHN N.
HAYWARD *et al.**Foreclosure of mortgage — Second foreclosure — Strict foreclosure — Parties —
Merger — Subrogation.*

Where A., who purchased certain mortgaged premises at a foreclosure sale, afterwards executed a mortgage upon said property, which mortgage was subsequently assigned to B. ; and then it being first learned that at the time of the foreclosure C. had a junior mortgage on the premises, and that he, through mistake, had not been made a party to the action. A. took an assignment of the foreclosed bond and mortgage, and joined with B. in this action for a second foreclosure of the mortgage, C. being made defendant :

Held, upon demurrer by C., that such second foreclosure action can be maintained, and thereby C.'s mortgage be shut off from being a first lien, the mortgage lien anterior to C.'s not being thereby increased.

B. is a proper party to the suit.

With respect to merger no inflexible rule can be formulated. The question depends in each case upon the interests and intent of the parties, and the demands of justice and equity.

Special Term, March, 1881.

DEMURRER to complaint.

Aaron J. Vanderpoel, for the demurrer.

Daniel D. Lord, opposed.

VAN VORST, J. — The defendant Hayward, who held a junior mortgage, was not made a party to the action in which a judgment of foreclosure and sale was made under a previous mortgage executed by Richard M. Tweed. That foreclosure, did not affect the defendant Hayward, and his interest remained the same as though that foreclosure had not been

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ordered. The omission to make Hayward a party to the previous foreclosure action arose through a mistake of fact. The register did not, on his return to the requisition of the plaintiffs in that action for incumbrances, make any mention of the Hayward mortgage, and he and his attorney were in entire ignorance of its existence until long after the sale under the judgment of foreclosure, and after rights had been acquired by others through the purchaser at the sale. At the foreclosure sale made on the 25th March, 1879, the mortgaged premises were bid off by Susan S. Franklyn, who is one of the plaintiffs in this action, for the sum of \$121,000, and on the 22d day of April, 1879, the referee's deed was delivered to her, and she entered upon the premises, and has ever since maintained possession.

On the 14th September, 1880, the plaintiff, Susan S. Franklyn, executed a mortgage upon the premises, with other property, to the Mutual Life Insurance Company for the sum of \$140,000, on which she received from the company \$50,000. After this, and on the 19th September, the plaintiffs were first advised of the existence of the Hayward mortgage, and that the same had been overlooked.

It was at this point that the plaintiff Henry Day intervened, and on the 22d day of September, 1880, he paid the \$50,000 which had been loaned and advanced by the Mutual Life Insurance Company, and took an assignment of its mortgage to himself.

Afterwards, and on the 26th day of October, 1880, Charles G. Franklyn, the holder of the mortgage which had been foreclosed, assigned that mortgage, with the bond accompanying the same, to George C. Allen, who on the same day assigned the same to Susan S. Franklyn, the purchaser of the mortgaged premises at the sale under the judgment of foreclosure, and this action was commenced by her for a second foreclosure of the mortgage, Henry Day being united with her as a plaintiff in the action.

Hayward, the owner and holder of the second mortgage,

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who was omitted as a party in the former action, is now made a defendant. The substantial question raised by the demurrer is, can this action be maintained? It is objected that the complaint does not state facts sufficient to constitute a cause of action.

It is claimed by the learned counsel for the defendant, in substance, that the mortgage first above described became merged in the judgment of foreclosure and is absolutely extinguished, and cannot be made the foundation of a new proceeding of that nature, and that the plaintiff Susan S. Franklyn holds the land and nothing else; and that the land is subject to the mortgage of the defendant Hayward as a first lien thereon.

If that claim be upheld it will be to prefer absolutely the Hayward mortgage to that executed by Susan S. Franklyn, after she had acquired title to the mortgaged premises, to the Mutual Life Insurance Company, and which is now held by the plaintiff Henry Day.

On the subject of merger there can be no inflexible rule formulated. A court of equity will consider all the facts, and will determine the question in every case according to the interests and intent of the parties and the demands of substantial justice and equity.

To hold, under the facts and circumstances of this case, that the purchaser at the foreclosure sale, and those who claim through her, are remediless through the omission to make Hayward a party to the former action of foreclosure would be inequitable. And if redress can only be had by reviving the first mortgage and allowing it to be again foreclosed such result must be accepted. And it is not discoverable how the defendant will be prejudiced or deprived of his just rights by such course. He has parted with no new consideration on the strength of that foreclosure, and if he has gained any apparent advantage it is through an omission originating in a mistake of fact on the part of those who conducted that proceeding. He is exposed to no greater peril by being made a party

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defendant to this action than he would have been if he had been brought in as a defendant in the former action. It cannot be improper to allow that to be done now which should have been done then had the facts been known. This action being brought by a mortgagee in possession, or rather by one purchasing under a mortgage which has been foreclosed, is of the nature of a strict foreclosure.

A sale is, however, asked in the prayer for relief, which is not usually demanded in cases of strict foreclosure. Actions of strict foreclosure are of rare occurrence, yet they have been favored under circumstances similar to those here existing (*Benedict agt. Gilman*, 4 *Paige*, 58; *Ross agt. Boardman*, 22 *Hun*, 527, and cases there cited).

I conclude that Henry Day is not an improper party to this action. He should be placed in such position that he may be adjudged to receive out of the proceeds of the sale, if one be ordered, the sum advanced by him on the purchase of the mortgage to the Mutual Insurance Company.

Mrs. Franklyn, by her purchase at the foreclosure sale, succeeded to the rights of the mortgagee in the prior mortgage. She intended to create a first mortgage and give a security of that nature to the insurance company. Mr. Day occupies the position of the insurance company and should be subrogated to all its rights, which would include a right to participate in the proceeds realized by the plaintiff Susan S. Franklyn on her mortgage to the amount of the moneys advanced by him, with interest. This will not, in fact, increase the amount of the mortgage lien, anterior to that of the defendant Hayward's mortgage, above what it was before the first foreclosure suit was commenced.

It is not proper at this time to state the precise nature of the relief which the plaintiff will be entitled to, nor, in detail, the manner in which the rights and equities of all the parties will be best protected. Doubtless, on the trial, should an answer be interposed, their rights will be presented and cared for in a manner to inflict no real injury on any one. It is suf-

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ficient now to say that the allegations of the complaint disclose a cause of action, and that Mr. Day is a proper party to the suit. There is no misjoinder of causes of action.

There should be judgment for the plaintiffs on the demurrer, with liberty to the defendants to answer on payment of costs.

N. Y. COMMON PLEAS.

CLARK agt. CARROLL.

Costs on appeal from district courts — Code of Civil Procedure, sections 3060, 3067.

On appeal from a judgment of a district court, the appellant on reversal, is entitled to thirty dollars costs, besides costs of the court below. The Code of Civil Procedure, sections 3060 and 3067, providing for costs on appeal from judgments of justices of the peace, apply to appeals from the district courts.

Special Term, May, 1881.

TAXATION of costs on appeal from district courts.

Thomas Cushing, for appellant.

J. C. De La Mare, for respondent.

J. F. DALY, *J.*—The Code of Civil Procedure, sections 3060 and 3067, providing for costs on appeal from judgments of justices of the peace, apply to appeals from the district courts. Section 3213 provides that appeals from the latter courts may be taken in the cases and in the manner prescribed for appeals from the former.

The manner of taking the appeal includes the manner of disposing of it, when there is no other provision as to how the appeal shall be determined and as to costs thereon.

Wood agt. Mitchell.

The repealing act of 1880, chapter 245, section 3, subdivision 7, declares that the repeal does not affect any provision of the existing laws relating to the district courts or costs or fees * * * in those courts, &c.

This does not touch the question as to costs in the court of common pleas on appeal from these courts.

The appellant, on reversal, is therefore entitled to thirty dollars (*sec.* 3067) and to costs of the court below (*sec.* 3060). Only one bill of costs can be taxed.

The item for stenographer's fees must be reduced to twenty-three dollars, and the item of four dollars for copy of return must be disallowed.

SUPREME COURT.

JAMES R. WOOD and others, surviving executors and trustees under the will of JAMES ROWE, deceased, agt. VIOLA YATES MITCHELL and others.

Will—construction of—Half blood sisters entitled to share in distribution.

Where a testator directs the payment of a part of his estate, with its accumulations, to a granddaughter at her majority, and in case of her death, before becoming of age without issue, "to her then living brother and sisters and the issue of any deceased brother or sister," and said granddaughter died unmarried before attaining her majority, leaving her surviving two sisters and brother of the whole blood and two sisters of the half blood :

Held, that the two sisters of the half blood are entitled to a distributive share.

Special Term, April, 1881.

Austin Abbott, for plaintiffs.

Joseph S. Bosworth and *George C. De Witt*, for defendants.

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LARREMORE, J.—James Rowe, by his will, dated February 19, 1868, after making provision for the payment of his debts, directs a sale of all his residuary estate by his executors and an investment by them of a certain portion thereof for the benefit of his wife and son, Henry C. Rowe. He further directs that the balance be divided into seven equal parts and invested, and that the income thereof be applied to the use of his six daughters therein named, and upon their respective deaths, that the principal and unappropriated income thereof be distributed among their living lawful issue *per stirpes*. Said will further provided that in case either of said daughters should die, leaving no lawful issue her surviving, that such principal and unappropriated income shall be paid over to such persons (and in such shares and proportions) as by the present laws of the state of New York would take personal property of which the testator died possessed had he died intestate. The remaining one-seventh of the estate the testator disposed of as follows:

“*Seventh.* I order and direct my said executors, the survivors and survivor of them, and such of them as shall act, to subdivide the remaining seventh part of the proceeds of may said real and personal estate into four equal parts, and to invest and accumulate one of said equal fourth parts until the arrival at full age or the death of my granddaughter Viola Yates, child of my deceased daughter Cordelia Yates, whichever shall first happen, and upon her arrival at the age of twenty-one years to pay over the same, with its accumulations, to my said granddaughter; and in case of her death prior to attaining that age, to pay over the said fourth part, with its accumulations, to her lawful issue; and in default of issue of my said granddaughter living at her death, then to pay over the same, with its accumulations, to her then living brothers and sisters and the issue of any deceased brother or sister who shall have died leaving lawful issue then living, each then living brother and sister of hers taking one equal share thereof, and the issue of any deceased brother or sister of hers

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taking, by representation, the share the parent of such issue would have taken if living. And to invest and accumulate one other of said equal fourth parts until the death or arrival at full age, whichever shall first happen, of my granddaughter Adelaide Yates, child of my deceased daughter Cordelia Yates, and upon her arrival at the age of twenty-one years, to pay over the same, with its accumulations, to her; and in case of her death prior to her attaining the said age, to pay over the said fourth part, with its accumulations, to her lawful issue; and in default of issue of my said granddaughter Adelaide living at her death, then to pay over the same, with its accumulations, to her then living brothers and sisters and the issue of any deceased brother or sister who shall have died leaving lawful issue then living, each then living brother and sister of hers taking one equal share thereof, and the issue of any deceased brother or sister of hers taking, by representation, the share the parent of such issue would have taken if then living. And to invest and accumulate one other of said equal fourth parts until the arrival at full age or death, whichever shall first happen, of my grandson Henry Yates, child of my deceased daughter Cordelia Yates; and upon this, at the age of twenty-one years, to pay over the same to him, with its accumulations, and in case of his death prior to attaining said age, to pay over the said fourth part, with its accumulations, to his lawful issue; and in default of issue of my said grandson Henry living at his death, then to pay over the same, with its accumulations, to his then living sisters and the issue of any deceased sister who shall have died leaving lawful issue then living, each then living sister of his taking one equal share thereof, and the issue of any deceased sister of his taking, by representation, the share the parents of such issue would have taken if living. And to invest and accumulate the remaining one equal fourth part until the arrival at full age or death, whichever shall first happen, of my granddaughter Catherine Yates, child of my deceased daughter Cordelia Yates, and upon her arrival at the age of twenty-one years, to pay over

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the same, with its accumulations, to her; and in case of her death prior to attaining said age, to pay over the said fourth part, with its accumulations, to her lawful issue; and in default of issue of my said granddaughter Catherine, living at her death, then to pay over the same, with its accumulations, to her then living brother and sisters and the issue of any deceased brother or sister who shall have died leaving lawful issue then living, each then living brother and sister taking one equal share thereof, and the issue of any deceased brother or sister of hers taking, by representation, the share the parent of such issue would have taken if then living."

By a codicil to the will, dated April 8th, 1871, the testator revoked the provisions therein as to his daughters Maria C. Shepard and Louisa Cornell, giving other and further directions as the disposition of their respective shares, but in other respects ratifying and confirming his foregoing will.

The testator died October 18, 1871, and his will and codicil were admitted to probate December 11, 1871. His daughter Cordelia Yates died prior to 1860, leaving her surviving, her husband Charles Yates and four children, being the grandchildren named in the seventh subdivision of the will. They were as follows: Viola Yates, now the wife of Ovine P. Mitchell; Adelaide Yates, now the wife of George C. Freeborn; Henry Yates; Catharine Yates, who died November 30, 1874, unmarried and before having attained her majority. Said Charles Yates, the father of said Catherine, as aforesaid, in October, 1860, married Josephine S. Bosworth, by whom he had issue Frances Yates and Stella Yates. Catherine Yates, therefore, left her surviving Viola Yates, Adelaide Yates and Henry Yates, sisters and brother of the whole blood; Frances Yates and Stella Yates, sisters of the half blood.

The question presented for adjudication is whether, under the testator's will, as republished and reaffirmed by its codicil, Frances and Stella Yates are entitled to a distributive share of the estate of their deceased half-sister.

It was urged on the argument that no such estate vested in

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Catherine as upon her death would become the subject of inheritance from her by her next of kin; that as she had but one brother and two sisters of the whole blood, the limitation to "her then living brother and sisters" must be understood in the natural and ordinary sense of children of the same parents.

It will be conceded that the legal and common presumption is in favor of the usual line of descent, unless a contrary intention is manifested by the testator (*Barnes* agt. *Greenbach*, 1 *Edw. Ch.*, 41; *Hussey* agt. *Burkley*, 3 *Edw. Ch.*, 194; *Cutter* agt. *Doughty*, 23 *Wend.*, 513; 7 *Hill*, 305; *Jarman on Wills*, [2d vol.], 665; *Grieves* agt. *Rawley*, 10 *Hun*, 63; *Quinn* agt. *Hardenbrook*, 54 *N. Y.*, 86; *Scott* agt. *Guernsey*, 48 *N. Y.*, 106).

A sister is defined to be a "woman who has the same father and mother with another, or has one of them only; in the first case she is called sister, simply; in the second, half sister" (*Bouvier's Law Dictionary*).

The testator in this case directed that the six shares of his daughters dying intestate should be paid unto such persons and parties as, by the present laws of New York, would take personal property of which he died possessed and intestate. In such case it seems to have been his intention to convert such share in personal property. In that event one-fourth of one-seventh—or one-twenty-eighth—part of his estate would have vested in Catherine Yates, and would, in case of her death, have gone to her next of kin, half and whole blood sharing in the distribution (2 *R. S.*, 75 [*Edmunds' edition*], 101).

Of this the testator is presumed to have had knowledge, for Mr. Yates was married, and his daughters Stella and Frances were in *esse* when the will was made. It was confirmed by the codicil, and thus made to speak from the date of its republication (*Van Alstyne* agt. *Van Alstyne*, 28 *N. Y.*, 375).

There can be no doubt that if his daughter Cordelia had

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been alive, the testator would have made the same provision for her that he did for her sisters. As she was dead, her share was given to her children, with remainder over in case of their death during their minority. In the latter event the portion of the one so dying would have vested in the survivors.

The intention of the testator, says the law, must be gathered from the whole will (*Mann* agt. *Mann*, 14 *Johns.*, 1; *Lovett* agt. *Gillender*, 35 *N. Y.*, 64), and construed in connection with the codicil (*Wescott* agt. *Cady*, 5 *Johns. Ch.*, 334; *Howe* agt. *Van Schaick*, 3 *N. Y.*, 538). By its terms the estate is converted into personalty, as such to be distributed. There is no express limitation in the will to lineal descendants. Such limitation first appears in the codicil as to two shares only; and the distinction thus made and the reaffirmation of the will evince a determination on the part of the testator that the remaining shares of the estate should, upon the happening of the contingencies above mentioned, be paid unto such persons and parties as by the present laws of New York would take personal property of which he died possessed and intestate. Such disposition of his property is directed in six clauses of the will, and no other or different intention in this respect is shown by the seventh clause. By it, in case of the death during minority of either of the grandchildren without issue, their respective shares were to be paid, as to Viola and Adelaide, to her then living brothers and sisters; as to Henry, to his then living sisters; as to Catherine, to her then living brother and sisters; each then living brother and sister taking one equal share.

It is evident that the testator intended a like provision for each grandchild; and the use of the term "brothers" in two instances, and "brother" in another, should not be allowed to impair the general scheme of disposition presented by the will.

Stella and Frances were "sisters" of Catherine within the meaning of the law; and the testator must be presumed to

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have used that term in its ordinary or primary meaning, as it does not appear from the seventh clause or the context that he used it in any other or secondary sense (*Cromer agt. Pinckney*, 3 Barb. Ch., 466).

The direction to pay over Catherine's share to "her then living brother and sisters, and the issue of any deceased brother or sister, who shall have died," is confirmatory of the theory that no restriction to brothers and sisters of the whole blood was intended. Henry was Catherine's only living brother. This fact was known to the testator. He must also have known that it was impossible that Catherine should leave her surviving a living brother and also issue of a deceased brother, unless one of such brothers were of the half blood.

For the reasons above stated I am of opinion that Stella and Frances Yates are entitled to a distributive portion of the share of their sister Catherine Yates under the will of James Rowe, deceased.

N. Y. SUPERIOR COURT.

ARTHUR SEWELL agt. BRAYTON IVES, as president of the New York Stock Exchange.

New York Stock Exchange—Illegal expulsion of member—Liability of Exchange for proceeds of sale of seat—Seat of member property.

The plaintiff having been expelled from membership of the New York Stock Exchange upon an accusation of "obvious fraud," and the court having held such expulsion to be illegal. In the meantime, the defendant, treating the plaintiff as effectually expelled, sold his seat and appropriated the proceeds to the payment of his creditors in the exchange:

Held, that the exchange, sued in the name of its president, is liable to plaintiff for the amount of the proceeds realized for such seat.

The New York Stock Exchange being composed of more than seven persons, owning and having an interest in property in common, and who

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would be liable to an action on account of such ownership and interest, this action being brought by the plaintiff, a member, in relation to his interest in that property, is properly brought against the defendant as president.

The property wrongfully taken or appropriated by the defendant in satisfaction of a demand against the plaintiff, as owner, cannot be set up in bar or in mitigation of damages suffered by him.

The seat of a member in the Exchange is property in every proper sense of the term, and can be sold, and is transferrable as any other species of property having actual value as such.

Special Term, May, 1881.

THE action is brought to recover damages for the sale of plaintiff's seat as a member of the New York Stock Exchange.

The Stock Exchange is a voluntary unincorporated association of a thousand members, and the defendant is sued as president of it. The plaintiff, on the 31st of December, 1877, was suspended under article 14 of the constitution of the Exchange for failing to meet his contracts.

The association, in January, 1878, attempted to expel the plaintiff upon an accusation of "obvious fraud," and in an action between the same parties this court adjudged and decided that his expulsion was illegal and void. The defendant, treating the plaintiff as effectually expelled under article 20 of its constitution, in April, 1878, sold his seat and appropriated the proceeds to the payment of his creditors in the exchange.

Roger A. Pryor and J. S. Logan, for plaintiff.

Robert Sewell and F. F. Marbury, for defendant.

SPEIR, J.—It has been decided by this and other courts that the seat of a member in the Exchange was property in every proper sense of the term and could be sold, and was transferrable as any other species of property having actual value as such. The price realized by the defendant was \$4,000, which

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is proof of its then value. It was proved, and the court on the former trial found that the plaintiff paid, on his admission to the board, for his seat, \$2,000.

The New York Exchange being composed of more than seven persons, owning and having an interest in property in common, and who would be liable to an action on account of such ownership and interest, this action, being brought by the plaintiff, a member, in relation to his interest in that property, is properly brought against the defendant, as president.

Although the plaintiff is a suspended member of the New York Exchange, it having been held and decided by this court that his alleged expulsion therefrom was void and of no effect, it clearly follows that the sale of his seat by the board having been made solely upon the ground of his wrongful expulsion, the Exchange have become by that act responsible to the plaintiff for any injury or damage done thereby. It is not disputed that the sale was made by the defendant, and that it realized thereon the sum of \$4,000.

It is claimed that the proceeds of this sale were applied to the payment of the plaintiff's debts in the Exchange, and that such payment is in mitigation of damages if not in bar to the action. If this be so it must be upon the assumption that the defendant had authority to dispose of the seat, and to receive and appropriate the proceeds of the sale to his creditors. Under the facts in the case no such authority is shown, nor can any be inferred, as all the proceedings on defendant's part were wholly illegal and void. The property wrongfully taken or appropriated by the defendant in satisfaction of a demand against the plaintiff as owner cannot be set up in bar or in mitigation of damages suffered by him. The first objection urged against the plaintiff's right to recover is that the action was for the conversion of personal property, commonly known as an action of trover. The declaration tersely sets out "that the plaintiff was owner and entitled to the possession of a seat in the association of the value of \$10,000; that the defendant wrongfully and unlawfully sold said seat and

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converted the proceeds to his own use to the plaintiff's damage," &c.

Now it is too plain that the defendant treated the seat of the plaintiff as his property or he could not have undertaken to sell it. It is too late to raise this objection. They are estopped by their own acts. Besides, the plaintiff's case is made out as stated in his complaint.

The second objection to the recovery is answered in the foregoing reply to the first objection. The question in this case has not been litigated in the former suit. So far as the plaintiff's rights are affected, it is the same as though he were a stranger to the defendant, and being the owner of this peculiar kind of property had it taken from him without authority of law and converted the proceeds. The amount of recovery in this action must be the amount of the proceeds recovered by the defendant, with interest. Judgment must accordingly be for the plaintiff, with costs.

SUPREME COURT.

THE PEOPLE EX REL. JEROME B. PARMENTER agt. JAMES S.
WADSWORTH, as Comptroller, &c.

Code of Civil Procedure, secs. 1013, 2083—Reference—when issue of fact joined upon an alternative mandamus may be tried by a referee—Compulsory reference, in what cases may be made.

Where the return and answer to an alternative *mandamus* shows that the trial of the issues made thereby, will involve the examination of a long account, a compulsory reference may be ordered by the court. Sections 1013 and 2083 of the Code of Civil Procedure which are apparently in conflict, reconciled.

Albany Special Term, April, 1881.

The People *ex rel.* Parmenter agt. Wadsworth.

WESTBROOK, J. — This is an application for a writ of *mandamus*, to compel the comptroller of the state of New York, to pay to the relator, Jerome B. Parmenter, an amount claimed to be due to him for state printing. To the alternative *mandamus* granted in the cause, a return was made by the comptroller, to which return the relator has answered, controverting and denying certain allegations of fact contained in such return. The return and the answer thereto show that the trial of the issues made thereby will involve the examination of a long account. The attorney-general now moves for the trial of such issues of fact by a referee, to be appointed by the court; to which the counsel for the relator objects, unless a referee can be agreed upon by him and the attorney-general, he claiming that by section 2083 of the Code, “an issue of fact joined upon an alternative writ of *mandamus*, must be tried by a jury, * * * unless a jury trial is waived or a reference is directed by consent of parties.” The objection to the reference, made by the counsel for the relators, cannot be upheld, for the reason that section 2083 of the Code applies to the trial of ordinary issues of fact which are properly triable by a jury. This construction is justified and made necessary by section 1013 of the Code, which expressly provides that the court may “direct a trial of the issues of fact by a referee when the trial will require the examination of a long account on either side;” and such section further declares that the court may order such reference “of its own motion or upon the application of either party, without the consent of the other.” This clear power, conferred by section 1013, is not expressly taken away by section 2083, and the latter must therefore be construed as if the cases provided for in section 1013 were excepted from its operation.

An order of reference must be made, and counsel may submit names from which a referee may be selected, and the court will, if they are unable to agree, select such referee.

Matter of Fitzgerald.

SUPREME COURT.

In the Matter of THOMAS FITZGERALD.

Guardianship.

The appointment by a father, through his last will and testament, of a guardian for an infant child is effectual without the consent of the mother.

Chapter 172 of the Laws of 1862 requiring the consent in writing of the mother to such appointment is repealed by chapter 32 of the Laws of 1871.

Thompson agt. *Thompson* (55 *How.*, 494) approved.

First Department, General Term, April, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order of the special term denying petition for *habeas corpus*.

Thomas Nolan, for appellant.

Francis V. S. Oliver, for respondent.

BRADY, J. — This proceeding was commenced by the service of a *habeas corpus* on the petition of Maria F. Fitzgerald. The return alleged that the respondent Thomas Fitzgerald had the possession and care of the infant Thomas Fitzgerald by the direction and consent of Hannah E. Fitzgerald, who was appointed the guardian of the infant by his father Michael F. Fitzgerald in his last will and testament, which was found on file in the office of the surrogate of the county of New York, and offered for probate. The traverse to the return admitted the appointment of Hannah E. Fitzgerald as the guardian of the infant, but alleged that the relator, who was the mother of the infant, never, by word, in writing or in any way, signified her assent thereto. The writ was dis-

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missed upon the ground that the father's appointment of a guardian was valid and effectual without the consent of the mother, and hence this appeal.

The statute of 1871 (*Laws of 1871, chap. 32, p. 39*) declares that every father may, by deed or last will duly executed, dispose of the custody and tuition of any living child, or one likely to be born, during its minority, or for any less time, to any person or persons in possession or remainder. The legislature had in a prior act passed in 1862 (*see Laws of 1862, chap. 172, sec. 6*) declared that no man should bind his child to apprenticeship or service, or part with the control of such child, or create any testamentary guardian therefor, unless the mother, if living, should in writing signify her assent thereto. The statute of 1871 in reference to the testamentary guardian is, therefore, in direct conflict with the provisions of the act of 1862. The appellant seems to think that the act of 1862 is still in force, notwithstanding the enactment of 1871, to which reference has been made. The two acts are, in the respect mentioned, in direct antagonism to each other, the one declaring that no man shall create a testamentary guardian for his child without the assent of the mother, if living; and the other declaring that he may so do, the statute of 1862 would in consequence seem to be repealed by very well settled principles.

The question presented by the appellant has been elaborately considered by Mr. justice VAN VORST in the case of *Thompson agt. Thompson* (*see 55 How., 494*), and he arrived at the conclusion that the statute of 1862 was repealed. We entertain no doubt as to the correctness of that decision, and consider that case to be decisive therefore of the question at issue. We are not advised of the reasons which induced the legislature to change the law on the subject under consideration, nor are we called upon to express our views upon the propriety of its action in so doing. The power of disposition given by the act of 1871 would seem to be very impolitic and unjust, although instances might arise in which its exer-

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cise would be for the advantage of the child. It would seem to be unjust for the reason that the custody might be given to a person other than a deserving mother, by reason of the mere caprice or prejudice of the decedent or of the exercise of undue influence over him.

It is our duty, however, to administer the law as we understand it, and we have, therefore, no alternative other than to affirm the order appealed from without costs.

SUPREME COURT.

ANGELO FARACE agt. CHRISTINA FARACE.

Divorce — Verified complaint — Facts which are to be considered matters of affirmative defense.

The facts required to be alleged in the complaint in a suit for divorce — that the alleged adultery was committed without plaintiff's consent, connivance, privity or procurement; that five years have not elapsed since its discovery, and non-cohabitation thereafter — are to be considered, where the complaint is verified, a matter of affirmative defense, which the defendant, in view of the disability of the statute, is bound to controvert and disprove.

Special Term, May, 1881.

LARREMORE, J. — I think the proof sufficient to sustain the referee's finding upon the question of identity. The other exceptions to his report relate to his omission to examine the plaintiff, on oath, as to the facts enumerated in rule 73 of this court, viz.: that the alleged adultery was committed without plaintiff's consent, connivance, privity or procurement; that five years have not elapsed since its discovery, and non-cohabitation thereafter. All these facts are alleged in the complaint, which is verified, and the referee has reported them as found affirmatively.

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Section 831 of the Code of Civil Procedure declares that "a husband or wife is not competent to testify against the other upon the trial of an action or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage."

We are relegated to the old practice in chancery by which such collateral facts set forth in a verified complaint, or by affidavit, become *prima facie* evidence, and the burden of proof is thus shifted upon the defendant.

No other construction is consistent with the statute. The proof required by rule 73 must primarily be obtained by the testimony of the plaintiff, which is made incompetent on the trial or hearing of the case upon its merits. If such facts must be established, and no one but the plaintiff can prove them, the only alternative is to consider them as a matter of affirmative defense, which the defendant, in view of the disability of the statute, is bound to controvert and disprove.

The exceptions to the report are overruled, and it is in all respects confirmed.

N. Y. COMMON PLEAS.

GEORGE B. GLACIUS agt. HENRY MOLDTZ.

Arrests—orders of, in district courts—what must be done to authorize.

Under the old Code a warrant must be issued in the first instance in every case, to authorize the judgment allowing an execution against the person.

As section 16 of the old Code is still unrepealed and operative, the only change made by the Code of Civil Procedure being that every action must be begun by summons and the substitution of orders of arrest for warrants of arrest, it would *seem* that the practice would be the same under the law as it now stands.

General Term, May, 1881.

Before C. P. DALY, P. J., J. F. DALY and BEACH, JJ.

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J. F. DALY, *J.*—Section 50 of the district court act, in force at the time this judgment was rendered, provides that “when a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered on the docket.” The statute does not enumerate the “cases” in which a defendant is subject to arrest and imprisonment in the judgment. The justice seems to have been of the opinion that in a case where a warrant of arrest might have been issued, as prescribed by section 16, the defendant is subject to arrest on execution against the person.

The appellant contends that in order to authorize the judgment allowing an execution against the person, it is indispensable that a warrant be issued in the first instance.

I think the latter view correct for these reasons: Actions in these courts at the time this suit was commenced were instituted by summons, by warrant or by attachment. If the case were one in which the defendant was subject to arrest, and plaintiff desired his arrest, a warrant was issued for such arrest, and such warrant was the original process (*Secs. 10 and 16.*) The constable making the arrest was to keep defendant in custody unless security was given as prescribed by the act of April 9, 1813, section 19. The act of 1813 provided for the giving of security, and conditioned that the defendant would surrender himself in execution within forty-eight hours from the entry of judgment. This is the only provision of the statute providing for a case in which defendant was to be charged in execution against the person, and must be deemed to be the only case intended from the fact that: 1. That it is the solitary provision on that subject; and, 2. The peculiar and distinctive form of action (*i. e.*, one commenced by warrant) to which such provision is applicable.

In this case the action was commenced on May 14, 1880, by summons, and no warrant was issued. The action was for “malicious injury to personal property,” and if the facts supported the complaint, a warrant for the arrest of the defend-

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ant could have been obtained, on which he would have been held to bail to await either a motion to vacate the warrant (*Johnson agt. Florence*, 32 *How.*, 230) or the judgment in the action. As plaintiff did not bring an action in which he could arrest defendant (*i. e.*, an action instituted by warrant), he had no right to have him arrested on execution; and the judgment, so far as it stated that defendant was subject to arrest and imprisonment, was erroneous. If the judgment be otherwise correct, it may be modified by striking out that portion of it. I find no error in the proceedings before the justice, and the evidence is sufficient to justify his finding that the injury was intentional and malicious. A number of witnesses established the main facts. The judgment for seventy-five dollars damages was not excessive.

It appears that the amount of costs and disbursements was actually inserted by the justice in his judgment. This is sufficient. It would have been sufficient had he given verbal direction to the clerk to insert the particular sum awarded.

The judgment appealed from should be modified by striking therefrom the statement, "This is an action in which the defendant is liable to arrest and imprisonment on the judgment herein," and affirmed as to the residue. No costs of this appeal.

DALY, C. J. — As the law originally existed in this state, the mode of commencing all personal actions, unless where they were commenced by original writ, was by a *capias ad respondendum*, upon which all persons could be arrested except those who were privileged from arrest, which was directed to the sheriff, who was bound to arrest the defendant to compel his compliance with the mandate of the writ. But afterwards, by the act concerning sheriffs (1 *Rev. Laws of 1813*, 424), it was the duty of the sheriff to discharge the defendant, upon his indorsing his appearance on the writ, unless the true cause of action, and one which was bailable, was expressed in

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the writ, by what was known as an *ac etiam* clause. The writ, therefore, denoted whether the defendant could be arrested and held to bail or not, and it was only when this appeared by the *capias* that a *ca. sa.* could be issued to charge the body in execution (1 *Dunlap's Practice*, chap. 3, sec. 3; 2 *id.*, chap. 20, sec. 5). But in the court of assistant justices in this city, of which the present district courts, with various modifications and changes, are a continuation, the proceeding was different, and action was commenced by summons or warrant, as the case might require. If by summons the constable simply returned that he had summoned the defendant, but if by warrant he arrested and brought him before the justice forthwith, who fixed the time for the trial, gave judgment within four days thereafter, the defendant remaining in the custody of the constable until he was discharged by the justice or charged in execution. Many changes followed from the act abolishing imprisonment for debt and other statutes, until the act of 1857 (*Laws of Vol. C*, 344, p. 707) provided for the cases in which a warrant of arrest might be granted (sec. 16) which had to be founded upon an affidavit which the defendant might controvert when brought before the justice, by counter-affidavit and move for his discharge from arrest (*Coles agt. Hanigan*, 8 *Daly*, 44; *Johnson agt. Florence*, 32 *How.*, 230), which was a discharge also from the action, as the action could not be commenced by warrant, unless the defendant was subject to arrest. If the defendant is liable to arrest, the action must be commenced by warrant, for the district court acts make no provision for the arrest of a defendant, except in the cases specified in the sixteenth section above referred to; and if any right remains to arrest in these courts in any other cases, from any statute not superseded and in force, it is only by warrant; and throughout our whole system, except as modified by certain revisions of the non-imprisonment act, the process by which the suit is commenced shows whether the defendant is subject to arrest or not. It remains in this respect as it did sixty years ago, when *Dunlap* pub-

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lished his book of practice, in which he states (*vol. 1, p. 94*) that the bailable nature of the action, as well as the liability of the defendant to arrest, must necessarily be decided previously to the issuing of the writ. The act of 1857, section 10, declares that actions may be commenced in these courts by summons, warrant, attachment or voluntary appearance, and then provides in what cases a warrant may issue to arrest. If the suit is commenced by summons, as was the case here, it is not an action where the defendant is subject to arrest, which appears by the nature of the process, unless the act is to be construed as authorizing the commencement of the action by summons and the issuing of a warrant at any time thereafter for the defendant's arrest. I see nothing in the act to indicate that this was intended, but simply to enact, as was always the case under the previous statutes, that where the defendant was subject to arrest and chargeable in execution, the action was to be commenced by warrant. The provision in section 50, that when judgment is given in a case in which a defendant is subject to arrest and imprisonment, the fact shall be stated in the judgment and entered in the docket, does not denote that the plaintiff may commence his action by summons and then aver and prove a cause of action which would subject the defendant to arrest and imprisonment and have it entered in the judgment and the docket. He (the defendant) was subject in the action to arrest and imprisonment. What is meant by this provision, in my opinion, is simply that it shall appear by the judgment and docket that the action is one authorizing the defendant to be charged in execution by the imprisonment of his person.

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COURT OF APPEALS.

AARON McCONNELL, appellant, agt. FRANKLIN D. SHERWOOD,
sheriff, &c., respondent.

Assignment — What provisions in, render it fraudulent and void.

Where, upon the face of an assignment, or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors it affords no protection to the assignee against a sheriff who seeks to enforce, by execution, a judgment against the debtor.

Where, in the assignment after describing the property, the assignor declares the conveyance to be in trust: *First*. To sell and dispose of his personal property and estate, and "collect the notes, accounts and choses in action, and the taking the part of the whole when the party of the second part" (the assignee) "shall deem it expedient to do so;" and, *Second*. Prescribes the distribution and payment of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or, if insufficient for that purpose, "in proportion to their respective demands," but further declares that the assignee "may have the right to compromise with" those creditors if in his opinion "it would be advantageous" to them and to the assignor:

Held, that the first provision does not taint the assignment.

Held, further, that to the clause permitting the assignee to compromise with the creditors of the assignor must be applied the rule which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds and therefore void.

Held, also, that applying this rule, the assignment was void upon its face (*Affirming*, *S. C.*, 58 *How.*, 543).

April, 1881.

FOR statement of facts, see 58 *Howard*, 453.

J. F. Parkhurst, for respondent.

M. Rumsey Miller, for appellant.

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DANFORTH, *J.* — Where, upon the face of an assignment or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff who seeks to enforce by execution a judgment against the debtor. This rule was applied at the circuit and the general term, but with different result. The trial judge held the instrument valid upon its face, and the jury found that it was made in good faith and without intention to hinder or defraud the creditors of the assignor. The general term so construed its provisions as to imply an illegal purpose, and the correctness of this conclusion is the question here. It turns upon certain language in the *habendum* clause, when, after describing the property, the assignor declares the conveyance to be in trust; first, to sell and dispose of his personal property and estate, and “collect the notes, accounts and choses in action, and the taking a part of the whole when the party of the second part (the assignee) shall deem it expedient to do so;” and second, prescribes the distribution and payment of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or if insufficient for that purpose, “in proportion to their respective demands,” but further declares that the assignee “may have the right to compromise with those creditors, if in his opinion it would be advantageous” to them and to the assignor. Upon these provisions the contention hinges.

The first provision, taken literally, means only that the assignee may receive payment by instalments or from time to time. He is to collect the notes, &c., but he may take “a part of the whole when he deems it expedient to do so.” There is no direction to compromise, none to make abatement, none to give a discharge of the whole on receiving a part. It is not that a part may be taken *for* the whole, but of the whole. A debtor cannot insist on paying his debt by portions, nor is a creditor required to receive it in that manner; nor is payment and acceptance of a part satisfaction of the debt. The clause in question confers authority to receive fractional pay-

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ments, but none to give satisfaction. If there is doubt as to its meaning, it should be solved in such a manner as to uphold rather than destroy the instrument. It was construed at general term, however, and by the respondent here as if it conferred upon the assignee power to compromise or compound debts due the assignor by accepting part for the whole. This is not expressed, but if such is the effect, it would be no stronger than the case made in *Coyne agt. Weaver*, decided in this court February, 1881, where, to words similar to those now before us, there was added an express "right to compound for the said chose in action," and yet the assignment was upheld. Therefore the provision in question does not taint the assignment.

A different result follows from the clause permitting the assignee to compromise with the creditors of the assignor. To that must be applied the rule declared in *Grover agt. Wakeman* (4 *Paige*, 23; 11 *Wend.*, 187), and adopted in many later cases, either in words or effect, as the only safe one, and which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds, and, therefore, void. But within that limitation a failing debtor may, however, uselessly amplify the words which transfer his estate and appropriate it to the payment of his debts; for although he may thus excite suspicion and provoke litigation, and so bring his deed to judgment, they will not, unless inconsistent with the rights of creditors, invalidate his act. And first, it is in favor of this instrument that it provides for a surrender of all the debtor's property and its equal division. Such is the desire of the assignor as expressed in words: "To convey all his property for the benefit of all his creditors, without any preference or priority." These are the premises. The declaration of trust or direction for distribution of the proceeds of this property, is in furtherance of this desire. It goes to all creditors for all debts, and if not enough to pay in full, then *pro rata*. These are valid provisions, and if

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the assignor had gone no further, the object of the trust would have been carried out as one to the advantage of the beneficiaries. The debtor would have given up all that he had, to be applied without reserve to the payment of his debts. But then comes the succeeding clause, and this we cannot help seeing is a provision which at once nullifies all that has been commended. Without this it is such an instrument as is favorably regarded by a court of equity. With it the assignment comes within the principle of many cases where trusts have been "subverted as illegal," because the assignee was invested with some absolute or discretionary power beyond the direct appropriating of the assets to the payment of debts; or the assignor reserved to himself a power over the future direction of the trust fund, or an interest in it, to be taken care of for him by the assignee. If the assignment is valid, the trust to compromise is to be observed and regarded by the courts, and delay for that purpose in the disposition of the property or the distribution of the avails could be justified by the assignee, although required by a creditor to hasten the conversion of assets or pay over its avails. So, too, in negotiation for or arranging a compromise, the interest of the debtor is to be regarded and kept in view by the assignee, for it is permitted only when, in his opinion, such proceeding would be advantageous to the assignor. It, therefore, cannot be said that the assignor has devoted his property absolutely and unconditionally to the payment of his debts. If, under the preceding clauses, a creditor should insist that the assignor had so directed, the assignee could say there is also given an express power to compromise — *i. e.*, procure concessions from creditors — before parting with the property. If all the creditors should say, we will compromise — give us the whole property, and we will discharge the debts — the assignee could say, that would not be advantageous to the assignor, and in either case could uphold his conduct by the very words of the instrument. But suppose the assignment did not contain this clause? The

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assignee could neither delay the execution of the assignment by an effort to compromise, nor consider the interest of the assignor in determining the time or manner of the execution of his trust. As it is, while placing his property beyond the reach of process, the assignor retains an interest to be provided for, delays its application to the payment of his debts, by investing his trustee with power which requires time for its execution, and then prohibits its exercise, unless it is advantageous to himself. I am inclined to construe this clause as requiring a compromise, if at all, with all the creditors, not permitting it with any one, or any number less than all; but this does not meet the difficulty. There is the power to compromise, and this must be construed in the sense of compound, or to discharge the debts by paying only a part; and its accomplishment requires the consent of the creditors and the assignee—a payment of part by the assignee, and a discharge upon its acceptance by the creditors. The imposition, then, of terms and conditions, and in devising these the interest or advantage of the debtor must be considered. This is a plain departure from the power to convert, and the duty to pay over the proceeds of the property when converted, without regard to the debtor, and with no inquiry, save as to the existence of the debt and its amount. It is said that this compromise cannot be made unless each creditor consents; neither can it unless the assignee consents for the assignor—that is, deems it for his advantage also. But without this there may be delay justified; an effort to make a compromise would require it; and until it had been tried, if the assignee saw fit to make the effort, the court could not require him to act under the other trusts. The legal duty of the assignee under a valid trust is as plain and simple as that of an officer holding an attachment, or charged with the duty of enforcing judgment by execution. However great the apparent sacrifice, and however disadvantageous to the debtor, the law permits no wish or interest of his to come between the creditor and the satisfaction of his debt, and it requires from the appointee

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of the debtor equal celerity and the same indifference. Here, compromise, or an attempt at compromise, may precede payment, and with either is delay. It seems apparent, therefore, that the intent was to delay the payment of the debts, and create a trust for the use of the assignor; and either of these intents, both by the common law and the statute (2 R. S., 135, sec 1; *id.*, 137, sec. 1), is a fraud, in face of which the assignment cannot stand.

The cases cited by the appellant's counsel, and referred to in his interesting and impressive argument, raise no doubt as to the necessity of this conclusion. *Jewett agt. Woodward* (1 *Ed. Ch.*, 195) was most insisted upon; but there the question did not arise. The assignment was not attached but acquiesced in, and the bill was filed against the assignees for an account and payment of the money to which the creditors were entitled under it. And *Hone agt. Henriquez* (13 *Wend.*, 240), where it was held that one who had become a party to the assignment by a formal assent thereto could not be heard to say that it was void, and so, doubtless, an assignment, however objectionable, if executed by consent of all the creditors would be deemed valid and not void. But neither these cases or the reasons on which they stand aid the plaintiff. The creditors did not consent, and one objection to the assignment is that under its provisions the assignee could delay the execution of the other trusts until he ascertained whether they would compromise. Power to compromise restrains the creditors until the attempt is made. Thus they would be hindered, and a delay in the conversion of property or the payment of debts even for a single day would be fatal to the assignment, and whether the delay is directed by the instrument, or justified by its provisions, or made necessary for their execution, except so far as that delay is incident to the conversion of assets and payment of debts, can make no difference (*Nicholson agt. Leavitt*, 6 *N. Y.*, 510; *Brigham agt. Tillinghast*, 13 *id.*, 215). This illegal delay is provided for by the clause in question.

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It is also urged by the appellant that the jury found by their verdict "that the assignment was not made by the assignor with the intent or for the purpose of coercing creditors into compromising the debts he owed them." This is so, but it was after the court had held that the clause in question did not vitiate the assignment, and under a charge that it was not evidence of an attempt on the part of the assignor to coerce them. It was withdrawn from their consideration.

We think the learned trial judge erred in his construction of this clause of the assignment, and that the judgment given upon the verdict was properly reversed by the general term.

The order of that court should, therefore, be affirmed, and judgment absolute rendered for the defendant according to the stipulation upon which this appeal was taken.

All concur, except RAPALLO, J., absent.

N. Y. COMMON PLEAS.

LEWIS SCHIELE and another agt. RICHARD HEALY and others.

Assignment—Provision in, to pay individual debts out of partnership property, evidence of fraudulent intent—Such assignment void.

The insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm, is evidence of fraudulent intent on the part of the assignors so as to void such assignment.

The prior right of the creditors of the firm to its effect cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right and hinders or delays such creditor in enforcing payment of his demand against the firm from the firm's property, is a violation of the statute and a fraud upon such creditor.

General Term, May, 1881.

Before C. P. DALY, C. J., J. F. DALY and BEACH, JJ.

Schiele agt. Healy.

THE defendants Healy and Conway were partners in trade. In December, 1878, they made an assignment for the benefit of creditors to the defendant Cunningham, who was a preferred creditor for \$1,604.50, made up of two promissory notes, and owing to him by the said assignors. It appeared upon the trial that both these notes were dated the same day, to the same payee, but the smaller was signed by the defendant Richard Healy individually. The plaintiffs are judgment creditors of the partnership, and filed this bill to set aside the assignment as fraudulent, and a decree to that effect was given by the court below. The defendants appeal to this court.

Alvin Burt, for appellants.

John J. Adams, for respondents.

BEACH, J. — It is fair to conclude, from the evidence given upon the trial, that the note for \$200 was given by the defendant Healy for an individual debt. Thomas J. Conway, the payee, and who transferred it to the defendant Cunningham, states directly and without qualifications that the defendant Healy owed him a debt of \$400 before the formation of the firm, the half of which was represented by this note, while the balance was included in the one for \$1,200 signed with the firm name. Upon his cross-examination he states that Healy told him the \$400 was used in his business, which in no way tends to change the obligation to a firm indebtedness, because Healy had been doing business for some time before the copartnership of Healy & Conway was formed. Nor is the force of this evidence weakened by the testimony of defendant Conway that he was to assume one-half of the indebtedness for \$400, because that portion was included in the firm note for \$1,200, while the balance was represented by the individual obligation of Healy. This tends to establish a direct contradiction of that statement.

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In any event, were it true, the sum would have been a portion of the capital of the partnership, and in providing it each partner seems to have intended to contract a separate personal obligation.

The assignment was of the firm property, and the question arises whether or not it was rendered fraudulent and void by the preference of an individual indebtedness of one copartner.

In *Kirby agt. Schoonmaker* (3 Barb. Ch., 46) the case differed from the one at bar. The assignment covered both individual and partnership property, and gave preference to the creditors of the firm, except in two instances of individual indebtedness upon which the contention of its invalidity was founded. "These debts," says the learned chancellor, "were not directed to be paid out of the partnership generally, but the separate debt of each copartner was directed to be paid out of his portion of the proceeds of the joint property, and of his separate property. * * * The case, however, would have been entirely different if copartners who were insolvent and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, had made an assignment of the property of both to pay the individual debt of one of the copartners only. For an insolvent copartner who was unable to pay the debts which the firm owed would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity."

The creditors of a corporation are legally and equitably entitled to payment from the firm assets. If, as appears by the proofs, the note for \$200 was an individual debt of the defendant Healy, the provisions for its payment from the firm assets, in preference to demands against the partnership, was a fraud upon those creditors, and should invalidate the assignment. Neither the firm nor the other partner, Conway, was in any way liable upon the note, and its indorsement with the

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firm name by the maker, Healy, after or at the time of the assignment, was a fraudulent act showing a like intent. If the conclusion of fact is well founded, the decision of the court of appeals in *Wilson agt. Robertson* (21 *N. Y. R.*, 587), in addition to the adjudication (*supra*), seems to dispose of the case. The court say that the insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm "is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors. * * * The prior right of the creditors of the firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right or hinders or delays such creditor in enforcing payment of his demand against the firm from the firm's property, is a violation of the statute and a fraud upon such creditor."

The case of *Turner agt. Jaycox* (40 *N. Y. R.*, 470) does not bear upon the point. The decision was based upon the fact that, although the debt preferred was not originally contracted by the firm, they had subsequently, for a good consideration, agreed to and became liable to pay it.

The judgment must be affirmed, with costs.

SUPREME COURT.

THE NATIONAL MECHANICS' BANKING ASSOCIATION agt. JOSEPH C. CONKLIN and others.

Sureties upon a bond given to secure fidelity in a book-keeper — to what extent liable.

Where, in an action against sureties upon a bond given by A., as book-keeper of plaintiff, conditioned that he should faithfully discharge the duties of that position, "and the duties of any other trust or employment," relating to the business of plaintiff, which might be assigned to

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him or which he should undertake to perform; and A. was subsequently appointed receiving teller of plaintiff, and afterwards was found to be a defaulter, which defalcation occurred long after he was appointed teller:

Held, that the bond in question should not be held to cover this default.

Second Department, General Term, May, 1881.

Before BARNARD, P. J., GILBERT and DYKMAN, JJ.

E. H. Pomeroy, for plaintiffs.

John H. Bergen and Thomas D. Robinson, for defendants.

BARNARD, P. J. — The question presented is one purely of law — what is the true meaning of the bond upon which the action is based? In 1863, the plaintiff appointed the defendant, Joseph C. Conklin, as book-keeper. The bond in question was given upon the appointment. It is in the penalty of \$10,000, and was executed by the defendants. The recitals and conditions are as follows:

Whereas, the above named, the Mechanics' Banking Association, have appointed the above-named Joseph C. Conklin to the office of a book-keeper of the said association, and the said Joseph C. Conklin hath accepted the same, and consented to perform the duties thereof. Now, the condition of such obligation is such that if the above-named Joseph C. Conklin shall faithfully fulfill and discharge the duties committed to and the trusts reposed in him as such book-keeper, and of any other trust or employment relating to the business of the said association which may be assigned to him or which he shall undertake to perform; and shall, also, without neglect or delay, inform the president or cashier of the said association of any embezzlement of the money, property or goods belonging to, and of any fraud whatever, committed upon the said association, of any false entry, error, mistake or difference of account in the books thereof which he may discover, or which

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shall come to his knowledge as such book-keeper aforesaid, or while engaged in any other office, duty or employment relating to the business thereof, and which he may discover or which shall come to his knowledge in any matter or thing whatsoever appertaining thereto, and shall also faithfully keep all the secrets of the said association, then the above obligation to be void, otherwise to remain in full force and virtue.

The case discloses that the book-keeper continued to discharge his duties as such until 1870, when he was appointed receiving teller of the defendant's bank, with an increased salary. He continued to act as receiving teller until 1879, when he resigned, and was found to be a defaulter to the amount of \$2,700. This defalcation occurred long after he was appointed teller, and, probably, at or near the end of his employment as teller. The bond in question should not be held to cover this default. It was given to secure fidelity in a book-keeper, and has no direct reference to fidelity in any other employment. The general words referring to the duties of any other office or employment relating to the business of said association which may be assigned to him, or which he shall undertake to perform, can be referred to the performance of any duty temporarily and occasionally imposed upon the book-keeper as undertaken by him. Such a claim was proper and strictly applied to the employment as book-keeper. It happens from sickness and from other causes that an officer of the bank is temporarily absent, other officers perform his duties. There would be a chance, in such a case, that a bond to secure the faithful performance of the duties of book-keeper did not include a failure of duty committed while temporarily acting as teller or cashier. This claim in question would remove all controversy on that point. For acts done as an officer of the bank, and while book-keeper, his sureties would be liable. It is a far different thing after the book-keeper ceases to be such, and is appointed to a higher office with greater responsibility and a larger salary, to hold that this book-keeper's bond is to apply, by force of these general

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words, to the office of teller. One construction would easily fall within the intent of the parties, the other would not. No new office is mentioned or alluded to, and it is not probable that any was thought of by the parties. This view is further indorsed by the recital. That refers only to the fact the board has appointed a book-keeper, and that he has accepted that office, and upon that recital the condition is based. The recital limits the condition of the facts stated in the recital unless the language of the condition is irreconcilable with the recital. As we have seen, there is no repugnance. The bond is to cover all acts and omissions as book-keeper, and all acts and omissions in every office assigned to him while book-keeper. The judgment, therefore, should be reversed, and a new trial granted, costs to abide event.

DYKMAN, J., concurs.

SUPREME COURT.

GEORGE SHOEMAKER and another agt. EDWIN H. HASTINGS *et al.*

Fraudulent conveyances — Transfers which are not void under 2 R. S. (Edm. ed.), 135, sec. 1, declaring void conveyances, &c., of personal estate, made in trust for the use of the grantor.

The statute (2 R. S., 135, sec. 1) has no application to real and actual alienation, upon valuable consideration and positive and real purposes, although incidental benefits are reserved to the grantor.

Its object is to render simply ineffectual, clearly nominal transfers of personal estate, when the entire use and control are, by declaration of trust, in or out of this instrument, left in him who makes the transfer. The statute only avoids conveyances which are wholly to the use of the grantor.

The contract in question was made in September, 1871. The father was a man of intemperate habits, having a wife and four children. The plaintiffs were two of those children. The other two were a son, aged fourteen and a daughter aged eleven. The plaintiffs negotiated with the father for a purchase of the farm owned by him, which consisted of the "Kilbury lot," of which he held the title in fee, subject to a mortgage of about \$1,250, and another parcel known as the "Dorsey lot," which he held under a contract of purchase, on which there was due

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some \$850. The real estate was worth as follows: The Kilbury lot, \$2,750; the Dorsey lot, \$1,160. He was also indebted upon certain outstanding notes, given by him to various parties prior to the 1st of September, 1876. He also owned certain personal property, consisting of cattle, horses and farming utensils, some grain and cordwood. The value of the personal property was fixed at \$1,300, for which they were to give their father a mortgage, payable in ten years, with annual interest. But before the agreement was made the plaintiffs and their father agreed to maintain the two younger children until they should arrive at the age of twenty-one years, and then to pay each of them \$150, and that the mortgage to the father should be made for \$1,000 instead of \$1,300. Finally the articles of agreement were entered into September 20, 1876. The father agreeing to convey to the plaintiffs the "Kilbury lot" by a quit-claim deed, and to assign the "Dorsey lot"; and the plaintiffs on their part agreeing to pay all the promissory notes of their father given before September 1, 1876, and to pay the mortgage on the "Kilbury lot," and the amount unpaid on the contract for the "Dorsey lot," and also to support and maintain the younger children until they should respectively arrive at the age of twenty one years, and then to pay each of them \$150, and to give their father a mortgage for \$1,000, as specified. Soon after the conveyances were executed and delivered as agreed:

Held, that the transfer was intended to be an actual alienation of the property described in it, and was not a conveyance in trust for the use of the grantor alone, and therefore did not fall within the condemnation of section 1 of 2 Edm. Stat. 135.

Held, further, that considering the amount of the property left in the hands of the father by the mortgage from the plaintiffs to him, as compared with the small amount of those debts which were not assumed by the plaintiffs, together with the willingness manifested by the father to secure, by good indorsed notes, the payment of the plaintiff's debt, and all the other debts then owing by him, the evidence presented a question of fact as to whether the father intended by the transfer of his real and personal property to delay, hinder or defraud his creditors, which should have been submitted to the jury, as requested by plaintiff's counsel:

Held, also, that there is nothing in the transfer of the property to the plaintiffs which necessarily operated as a fraud on the creditors of their father.

Fourth Department, General Term, April, 1881.

THIS action was brought to recover for the wrongful conversion of a yoke of oxen and of 800 railroad ties, the prop-

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erty of the plaintiffs. The defendants, as judgment creditors of Daniel Shoemaker, Sr., the father of the plaintiffs, levied upon and sold this property as the property of Daniel Shoemaker, Sr. The answers of defendants, after a general denial of the allegations of the complaint, allege that the property sold was transferred to plaintiffs by their judgment debtor Daniel Shoemaker, Sr., in September, 1876, with intent to defraud his creditors, and no other issue was raised by the pleadings. The facts and circumstances relating to that transfer are as follows: Daniel Shoemaker, Sr., was a farmer who for several years had owned and occupied a farm about three miles from the village of Bath, Steuben county. His family consisted of his wife and four children, to wit, the plaintiffs, George Shoemaker, then aged twenty-two, Daniel Shoemaker, Jr., aged nineteen, another son, aged fourteen, and a daughter aged eleven. Although one of the plaintiffs was then under twenty-one years of age, he had been manumitted by the father, and plaintiffs had for several years done business for themselves in their own name, and then owned a tract of land adjoining their father's farm which the plaintiffs had purchased of judge Rumsey in 1874, and which was commonly called the Blakesly lot. The family since 1875 had lived in a house belonging to the plaintiffs, situate on the Blakesly lot, and for several years the care of the entire property had devolved upon plaintiffs by reason of the intemperate habits of their father. In the latter part of August, 1876, Daniel Shoemaker, Sr., sold the farm and all his personal property to plaintiffs. His financial condition at that time was as follows, to wit:

His farm consisted of the Kilbury lot, containing

110 acres, worth \$25 per acre..... \$2, 750 00

And the Dorsey lot, 58 acres, worth \$20 per acre. 1, 160 00

Total value of real estate..... \$3, 910 00

He also owned personal property worth..... 1, 300 00

His real and personal together amounted to.. \$5 210 00

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Brought forward..... \$5, 210 00

Contra.
 There was a purchase-money mortgage
 on the Kilbury lot which, with in-
 terest, amounted to..... \$1, 250 00

 There was unpaid on his contract for
 the Dorsey lot, with interest..... 850 00

His outstanding notes were estimated at 1,500 00

 And he owed the following debts
 not in notes, viz.:

Mrs. Hodge..... \$110 00

Defendant James Neel..... 20 00

Defendants Hastings & Coy. 70 00

_____ 200 00

3, 800 00

 He was therefore worth above his debts about... \$1, 410 00

 For the real estate the plaintiffs agreed to pay... \$3, 600 00

As follows, viz.:

 By assuming the mortgage on the Kilbury lot
 interest \$1, 250 00

By assuming to pay up the Dorsey contract..... 850 00

 By assuming to pay all the notes of Daniel Shoe-
 maker then outstanding... 1,500 00

\$3, 600 00

The plaintiffs also taking the land subject to the inchoate dower of their mother, and also agreeing to support their young brother and sister until their majority. This price paid by the plaintiffs for the land was concededly all that it was worth, and was \$900 more than it had cost Daniel Shoemaker, Sr., a short time before. By this sale, therefore, of his real estate alone, Daniel Shoemaker, Sr., provided for all his debts with the trifling exception of the accounts to Mrs.

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Hodge and defendants, together amounting to about \$200, the exact amount of which was not then known. The plaintiffs and their father were unable to agree upon a price for the personal property, the father claiming \$1,500 for it, but he finally agreed to refer the question of value to his neighbor David B. Brooks, and the latter fixed the value of the property at \$1,300, which amount plaintiffs agreed to pay, and to secure by a mortgage of the land. Daniel Shoemaker, Sr., then agreed with the plaintiffs that he would pay the \$200 of accounts out of his mortgage. This bargain of sale was put into writing and signed and sealed by the parties September 20, 1876. While the writings were being drawn, Mr. Brooks, the neighbor who had fixed the value of the personal property, suggested to Daniel Shoemaker, Sr., that he ought to have the mortgage made for an even thousand dollars, and let plaintiffs pay the other \$300 to the two younger children; to which the father agreed, and it was so provided in the contract. Daniel Shoemaker, Sr., then quit-claimed the land to plaintiffs, and assigned to them the Dorsey contract and the personal property, and they executed to him a mortgage of the farm, payable in ten years, with annual interest. The deed and mortgage were executed in September and October, 1876, but were left, with the contract, in the hands of the attorney, Mr. Oxx, so that the father might examine the mortgage before it was recorded, and both were recorded December 18, 1876. Neither Daniel Shoemaker, Sr., nor the plaintiffs waited for the final execution of the papers, but, immediately after the contract was signed, proceeded to carry out the bargain. The plaintiffs, as soon as the contract was signed, September 20, 1876, took possession and control of all the property, and as early as October 8, 1876, began to take up the \$1,500 of notes, which they had assumed, by paying them or substituting their own notes for them. Daniel Shoemaker, Sr., also proceeded at once to arrange the \$200 in accounts to be paid by him. In November, he gave his note to Mrs. Hodge,

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indorsed by Judge McMaster, for the \$110 claim, which was afterwards paid. On the ninth day of September, which was nine days after the bargain was made, but before the contract in writing was signed, he gave the defendants, Hastings & Coy, his note for their account, and at the same time offered to have it indorsed by Judge Rumsey or Judge McMaster, but they said they didn't want any indorser. This note to Hastings & Coy, was dated back at Hastings' request. At this, time, therefore, all of the debts of Daniel Shoemaker had been provided for, except these two claims of defendants, amounting then to about ninety dollars, and to pay this he had a good mortgage of \$1,000, besides credit, which enabled him to procure, as indorsers of his paper, Judge Rumsey, William Rumsey, Judge McMaster, the Hon. H. H. Hull, John F. Little and J. F. Parkhurst. On the 13th day of December, 1876, Hastings & Coy sued, in justices' court, the note given them in September by Daniel Shoemaker, Sr., and on the 18th day of December, 1876, Daniel Shoemaker, Sr., assigned the \$1,000 mortgage to McMaster & Parkhurst, to secure them for indorsing \$110 note to Mrs. Hodge, and for their indorsements to raise money to pay the claims of Hastings & Coy and defendant, Neel. This assignment was to secure them on account of "any note or notes which they or either of them have or may sign as indorsers for D. Shoemaker, Sr." The only note McMaster & Parkhurst was then liable upon was the Hodge note of \$110. Judge McMaster was indorser, after Judge Rumsey, on the Warden note of \$300, but that note was one of the notes assumed by plaintiffs. The purpose of making this assignment of the mortgage was proven by the testimony of Daniel Shoemaker, Sr., where he testifies, "the purpose of making the assignment of that mortgage to McMaster & Parkhurst, was so that they would indorse paper with me to pay the balance of these debts that were not assumed by the boys." And that purpose was evident from the terms of the assignment itself. The theory of the defendants was, that Daniel Shoemaker, Sr., had made this sale of

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\$5,210 worth of property to escape the payment of these two accounts, amounting to about ninety dollars, although it was conceded that, after the sale, he offered to secure the claim of Hastings & Coy, and it is undisputed that he has remained every day since then entirely solvent, being worth \$1,000 above his debts, and that he still remains so. Meanwhile the plaintiffs had got out some ties, part of them from the land purchased of their father, and the balance from the Blakesly lot, they had purchased from judge Rumsey. These ties were cut in November, December and January following the sale of the land. Hastings & Coy having perfected their judgment in justices court against Daniel Shoemaker, Sr., instead of attempting to collect this judgment from him, levied upon these ties and a yoke of oxen, being one of the yokes transferred by the contract with their father, and this levy was the first notice that plaintiffs had that these claims of defendants had not been paid. The plaintiffs immediately made arrangements for paying these claims, and went with their father to Hastings & Coy, and the father then offered again to give Hastings & Coy a note for the amount of their judgment and costs, indorsed by McMaster & Parkhurst, to whom he had assigned the real estate mortgage as security for that purpose. Hastings & Coy then refused to accept the note unless the plaintiffs would execute a release to them of damages occasioned from levying upon the ties. The plaintiffs then informed Hastings & Coy that the ties levied upon were not far from the river, and that the levy had prevented them from being taken by the railroad company when the inspector was around in February; that the snow might go off and high water take away the ties before the tie inspector came around again, and that if the ties were inspected and received by the company and not taken off by the flood, they would make no claim for damages by reason of the levy. Hastings & Coy refused then to make the settlement, and notified plaintiffs that they should sell the property. Accordingly the property, worth about \$400, was sold under the execution and

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bid in by the defendants for about eighty dollars, and soon afterwards this action was brought for the value thereof. All the facts above stated were proven and undisputed upon the trial. It was undisputed that plaintiffs paid the full value for all of the property; that provision was made at the time of the purchase for payment of all of the debts of D. Shoemaker, Sr.; that after payment of all the debts, there remained a surplus of \$1,000 for D. Shoemaker, Sr., which he still owns; that plaintiffs went into immediate possession and control of the property, and all of the debts were at once paid, except the claims of defendants, which, at the time of the sale, D. Shoemaker, Sr., said he would pay, and which he has twice, since that time, offered to secure; and that defendants claims were, at all times, collectible from the property of their judgment debtor, D. Shoemaker, Sr. There was not a *scintilla* of proof of any fraud. At the close of the testimony, Mr. Rumsey, defendant's counsel, asked the court to direct a verdict for defendants as to all the property, except the ties taken from the Blakesly lot, upon the ground that the necessary result of the transfer to plaintiffs was to hinder and defraud defendants as creditors of D. Shoemaker, Sr. This motion was denied by the court. After decision of this motion, the same motion was made upon another ground, and was granted, and it is the decision of the court upon that motion that is now brought up for review. This motion was that the court direct a verdict for the defendants as to all the property except the Blakesly ties, upon the ground that the sale was void under the section of the statute which reads as follows: "All deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." The court held that the sale was void under this section, and that the property was liable not only for the past, but for the future debts of D. Shoemaker, Sr.; and the only question

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submitted to the jury was the value of the Blakesly ties. The testimony upon which this decision was based is the testimony of the witness Oxx, to which we ask the particular attention of the court. To this decision plaintiff's counsel excepted, and among other requests, asked the court to submit to the jury the question whether the transfer of the land was fraudulent, and whether the transfer of the oxen was fraudulent. The motion was denied and plaintiffs' counsel expected. The jury rendered a verdict for plaintiffs, for the value of the Blakesly ties, and plaintiffs' exceptions were ordered heard in the first instance at the general term.

J. F. Parkhurst, for plaintiffs, appellants. I. The decision by judge RUMSEY, granting defendants motion, was erroneous for four distinct reasons: 1. The statute referred to does not apply to sales, but only to transfers in trust, without consideration, exclusively for the benefit of the assignor. 2. The statute applies only to transfers of personal property, and could not affect the sale of the land from which the ties were afterwards taken. 3. The testimony of Oxx was insufficient to prove a trust, even if the statute was applicable. 4. The defense that the transfer was void under the statute of personal uses, was not available because not pleaded. To establish the proposition that the statute of personal uses does not apply to such a transfer as this, it is only necessary to call the attention of the court to the case of *Curtis agt. Leavitt* (15 N. Y., 114-124, and pages 143-150; page 176 and pages 204, 205 and 206; see, also, *Rome Exchange Bank agt. Ecmes*, 1 Keyes, 600; *Bishop on Insolvent Debtors*, 181). 2. The statute applies only to transfers of personal property, and could not affect the sale of the land from which the ties were taken. A part of the ties sold by the constable were taken from the Kilbury lot, which was part of the lands sold to plaintiffs by their father. These ties were not cut until November, December and January following the sale of the land, and at the time of the sale and conveyance to plaintiffs

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were growing timber, a part of the realty. Plaintiffs' counsel asked to go to the jury upon the question whether the sale of the land was fraudulent which was denied, and plaintiffs' counsel duly excepted. If, for the sake of the argument, we should concede that the transfer of the oxen was void under the statute of personal uses the transfer of the lands would nevertheless be valid and effectual. That would be true even if transferred by the same instrument. As stated in *Curtis agt. Leavitt*, this statute "has no reference to intentions, whether fraudulent or honest. The simple inquiry is whether the property belongs to the debtor not upon the theory of fraud but upon the theory of equitable title reserved to himself" (15 *N. Y.*, 122). It is for this reason that a transfer may be valid as to some property although made by the same instrument by which a void transfer of other property is made. Upon this point the case of *Curtis agt. Leavitt* (*supra*) expressly overruled the case of *Goodrich agt. Downs* (6 *Hill*, 438), and held that even if the transfer was void as to a part it would not be void as to other property transferred in the same instrument (*Curtis agt. Leavitt*, 15 *N. Y.*, 114; *Bishop on insolvent debtors*, 181; *Knox agt. Jones*, 47 *N. Y.*, 389.) As, therefore, the statute is by express terms limited in its application to transfers of *personal* property, it did not affect the transfer of the real estate. Plaintiff's title to the ties subsequently cut from this land, was, therefore, unaffected by this statute, unless a further "construction" of this statute is devised, giving it a *post facto* effect upon those unsuspecting hemlocks. 3. The testimony of Oxx was insufficient to prove a trust even if the statute was applicable. 4. The defense that a transfer was void under the statute of personal uses was not available because not pleaded. As this defense has nothing to do with the question of fraud, or the honest or dishonest intent of the parties (*Curtis agt. Leavitt*, 15 *N. Y.*, 122), it will hardly be claimed that it was provable under the second defense. It was equally inadmissible under the general denial. It was new matter, and it is a well-settled rule that the answer must

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contain and allege all those facts which, when the cause of plaintiff, if admitted or proved, the defendant must prove in order to defeat a recovery (*Code of Civil Procedure*, sec. 500; *McKyring* agt. *Bull*, 16 *N. Y.*, 297, 304; *Ayrault* agt. *Chamberlain*, 33 *Barb.*, 229, approved 31 *N. Y.*, 614). And defendant cannot give proof of any such defense if not pleaded (*Defendorf* agt. *Gage*, 7 *Barb.*, 18; *Kelsey* agt. *Western*, 2 *N. Y.*, 501; *Field* agt. *Mayer*, 6 *N. Y.*, 179; *Sanford* agt. *Travis*, 40 *N. Y.*, 140). The testimony of Oxx could not have been excluded upon plaintiff's objection, because it was proper and admissible under the second defense upon the question of fraudulent intent. The defendants, however, cannot avail themselves of this testimony to establish a defense not set up in the answer (*Brazil* agt. *Isham*, 2 *Kernan*, 9; *Field* agt. *Mayer*, 2 *Selden*, 179; *Page* agt. *Willett*, 38 *N. Y.*, 31; *Wright* agt. *Delafield*, 25 *N. Y.*, 266; *Allen* agt. *Mercantile Ins. Co.*, 46 *Barb.*, 656; *Baldwin* agt. *U. S. Tel. Co.*, 1 *Lansing*, 135).

III. The motion made upon the ground that the transfer was made to defraud creditors was properly denied. There can be no fraud if the grantor retains enough property to pay all his other debts (*Jackson* agt. *Peck*, 4 *Wend.*, 300; *Babcock* agt. *Eckler*, 24 *N. Y.*, 623; 6 *Paige*, 62; *Van Wick* agt. *Seward*, 18 *Wend.*, 375). Even when affection is the sole consideration it is only *prima facie* fraudulent as to creditors (*Seward* agt. *Jackson*, 8 *Cowen*, 406; *Thompson* agt. *Hammond*, 1 *Edward Ch.*, 497; *Pell* agt. *Treadwell*, 5 *Wend.*, 661; *Proceas* agt. *McIntyre*, 5 *Barb.*, 424; *Billsboro* agt. *Titus*, 15 *How.* 95). And a liability as guarantor if proven would not have been considered without proof that the property was insufficient security for the balance of the purchase money (*Van Wyck* agt. *Seward*, 5 *Paige*, 62). And even if both plaintiffs had been infants the question of fraud was one for the jury (*Mathews* agt. *Rice*, 31 *N. Y.*, 457; see also 45 *N. Y.*, 554; *N. Y. Weekly Digest* [Jan. 20, 1879], 524).

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M. Rumsey, for defendants, respondents.

I. Any part of the agreement between Daniel Shoemaker, Sr., and the plaintiffs, which was made at time of making written instrument of transfer of property, but not included in written instrument, which is for benefit of grantor, is equally fatal to the instrument as if it had been made a part thereof (*Southard agt. Benner et al.*, 72 *N. Y.*, 424, 431, 432; *Russell agt. Winne*, 37 *N. Y.*, 595; *Ward agt. Lowry*, 17 *Wend.*, 492). *a.* And this may be proved by parol (*Southard agt. Benner*, 72 *N. Y.*, 432). It was proved without objection, therefore there could be no error.

II. The transfer of this property from Daniel Shoemaker, Sr., to plaintiff was void under 2 Edmund's Statutes, 135, section 1, which reads, "All deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against creditors existing or subsequent of such person." *a.* When the consideration of the conveyance is the benefit or support of grantor, his wife or children, conveyance is void against his creditors (*McLean agt. Button*, 19 *Barb.*, 450; 1 *Amer. Ldg. Cases*, 69; *Goodrich agt. Douns*, 6 *Hill*, 438; *Mackie agt. Carnes, Hopk. Ch.*, 373). *b.* When part of consideration is support of grantor or his family, such agreement can never be upheld against his creditors (*Robinson agt. Stewart*, 10 *N. Y.*, 195, 196). *c.* And when it appears in instrument that part of consideration is for future benefit of grantor, it is void on its face (*Carney agt. Griffin*, 2 *Comst.*, 365). *d.* An assignment is void for actual fraud, if while assignor provides for only a part of his creditors he attempts in the instrument to reserve any portion of the fund to himself. Such an attempt has been regarded as establishing what is sometimes termed a fraud in law, but more accurately it affords a conclusive presumption of an active, fraudulent design on the part of assignor (*Columb agt. Caldwell*, 16 *N. Y.*, 484).

III. The assignment of property between D. S. and his

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sons were void under 2 Edmund's Statutes, 137, sec. 1: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded, shall be void." The undisputed evidence was that one of the grantees was nineteen years old. The grantees both knew that the assignment carried all their father's property. Part of the consideration of the transfer by the terms of the instrument was, that the grantees should support and maintain the two infant children of the grantor until their majority, and then pay them each \$150, and execute a mortgage to the grantor for \$1,000, payable in ten years from its date, with interest annually, which was immediately on the day of its execution assigned to McMaster & Parkhurst. The grantees knew of existence of respondents' debts; knew of the failing if not insolvent circumstances of the grantor, and that respondents' debts were unprovided for, and that the result of the assignment left assignor with no means to pay respondents' debts; that it was also a part of the agreement that the grantor himself and his wife should always, as long as they desired, have a home on the land conveyed. Under the above circumstances the conveyance was void, because "a conveyance by one indebted at the time, by which the grantor secures some benefit to himself at the expense of his creditors, or by which creditors are prevented from compelling an immediate appropriation of the debtor's property to the payment of his debts, is deemed fraudulent and void" (*Young agt. Heermans*, 66 *N. Y.*, 382; *Stearns agt. Gage*, 79 *N. Y.*, 102, 104; *Robinson agt. Stewart*, 10 *N. Y.*, 190-193, 195;

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Collumb agt. Caldwell, 16 *N. Y.*, 484; *Barney agt. Griffin*, 2 *Comst.*, 365; *Todd agt. Monell*, 19 *Hun*, 363). In last case part of consideration was for support of grantor and wife, and it was held void. *b.* The fact that plaintiffs assumed to pay certain debts of Daniel Shoemaker, Sr., by the transfer, does not render the transfer valid or protect them from Daniel Shoemaker, Sr.'s creditors (*Union Nat. Bk. of Albany agt. Warner et al.*, 12 *Hun*, 306). *c.* Whether the intent be to delay or to defraud creditors, the sale is equally fraudulent (*Plank agt. Schermerhorn*, 3 *Barb. Ch.* 644; *Bokenburgh agt. Hubbell*, 15 *Barb.*, 563, *n.*; *Ogden agt. Peters*, 21 *N. Y.*, 23). *d.* The instrument, if void in part, was void in the whole (*Mittnacht agt. Kelly*, 5 *Abb. Pr. [N. S.]*, 445; *Goodrich agt. Donn*, 6 *Hill*, 438; *Mackie agt. Cairns*, 5 *Cow.*, 547, 580; *Grover agt. Wakeman*, 11 *Wend.*, 187, 225). The case of *Hungerford agt. Cartwright* (13 *Hun*, 647). I am of opinion that the case was decided on some other ground than appears in report, or else the line of authorities herein cited, particularly the one cited below, must have been overlooked. (*McLean agt. Button* (19 *Barb.*, 450), is upon all fours with case at bar, and that was an agreement between father and son for conveyance and support, and was held within the statutes (2 *R. S.*, 135, *sec.* 1) and void (*See Todd agt. Monell*, 19 *Hun*, 362 and 363). But our case is distinguishable from *Hungerford agt. Cartwright*, because it was a part of agreement here that grantor and his wife should have a home on the premises conveyed. This creates a trust. *f.* No particular form of words is necessary to create a trust (*Martin agt. Funk*, 75 *N. Y.*, 141; *Donovan agt. Van De Mark*, 78 *N. Y.*, 248).

IV. The transfer being void under 2 Revised Statutes, 135, section 1, as creating a trust for benefit of Daniel Shoemaker, and that appearing upon face of instrument and upon admitted facts, the court was right in holding transfer void in such case. Under that statute there never was any question for the jury; there is no question of intent here (*Spies agt. Boyd*, 1 *E. D. Smith*, 448; *Goodrich agt. Downs*, 6 *Hill*, 438).

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V. The question of whether transfer was void under 2 Revised Statutes, 137, section 1, was in this case a question for court to decide, and not for the jury. The facts alleged in point three being undisputed: 1st. Where the transfer on its face shows that it must necessarily have the effect of defrauding creditors of grantor, it is conclusive evidence of fraudulent intent and is void (*Kavanaugh agt. Beckwith*, 44 Barb., 194; *Cunningham agt. Freeborn*, 1 Edw. Ch., 256; *Nicholson agt. Leavitt*, 2 Selden, 510). 2d. The same rule prevails where extrinsic facts admitted by parties or established by evidence without dispute or explanation make the transfer necessarily fraudulent according to the law of the case (*Kavanaugh agt. Beckwith*, 44 Barb., 195; *Cunningham agt. Freeborn*, 11 Wend., 254, 255; *Webb agt. Daggett*, 2 Barb., 9; *Edgell agt. Hart*, 5 Seld., 219; *Seymour agt. Wilson*, 14 N. Y., 569.) 3d. When facts appear on face of instrument, or undisputed by evidence of the agreement, which render the agreement void, it is conclusive evidence of fraud, in fact, and must be so held by the court as a matter of law (*Southard agt. Benner et al.*, 72 N. Y., 431, 432; *see, also, Clark agt. Wise*, where this position is recognized).

TALCOTT, *P. J.*—This action was tried at the Steuben county circuit, and the exceptions sent to be heard here in the first instance after a verdict for the plaintiff. The action was brought to recover the value of one yoke of oxen and of certain railroad ties, which the defendants had caused to be levied upon and sold as the property of Daniel Shoemaker, Sr., the father of the two plaintiffs, by virtue of a judgment and execution against him.

The defendants claimed that a certain contract between said Daniel Shoemaker, Sr., for the conveyance to the plaintiffs of certain real estate and personal property consisting of cattle, horses, farming utensils, &c., by Daniel Shoemaker, Sr., to the plaintiffs, and of which the yoke of cattle sued for constituted a portion, was void as having been made with the intent to

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hinder, delay and defraud the creditors of the said Daniel Shoemaker, Sr. The contract in question was made in September, 1876. It seems that the father was a man of intemperate habits, having a wife and four children. The plaintiffs were two of those children. The other two consisted of a son aged fourteen and a daughter of the age of eleven. The two plaintiffs had for some time carried on the principal business of the plaintiff's farm, and then owned, as tenants in common in their own right, a tract of land adjoining their father's farm, known as the "Blakesly lot." For some time the business of carrying on the farm owned by the father had, by reason of his intemperate habits, devolved on the plaintiffs, and they had been negotiating with him for a purchase of the farm owned by him, which consisted of a lot known as the "Kilbury lot," containing about 110 acres, of which he held the title in fee, subject to a mortgage of about \$1,250, and another parcel known as the Dorsey lot, which he held under a contract of purchase, on which there was, with the accumulated interest due, some \$850. The real estate appears to have been worth as follows: The "Kilbury lot," twenty-five dollars per acre, \$2,750; the "Dorsey" lot, twenty dollars per acre, fifty-eight acres, \$1,160. He was also indebted upon certain outstanding notes given by him to various parties prior to the 1st of September, 1876. He also owned certain personal property consisting of cattle, horses and farming utensils, some grain and cord wood. In negotiating with the boys, Daniel, senior, claimed that this personal property was worth \$1,500. But the parties disagreed as to the value of the personal property and they finally agreed to leave it to a neighbor, a Mr. Brooks, to appraise the value of the personal property, which he fixed at only \$1,300, for which they were to give the father a mortgage payable in ten years, with annual interest. But before the agreement was made the plaintiffs and their father, at the suggestion of Mr. Brooks, agreed to maintain the two younger children until they should respectively arrive at the age of twenty-one years, and then to pay each of them \$150,

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and that the mortgage to the father should be made for \$1,000 instead of \$1,300. Finally the articles of agreement were entered into under the date of September 20, 1876, the father agreeing to convey to the plaintiffs the "Kilbury lot" by a quit-claim deed, and to assign the contract for the "Dorsey lot," and the plaintiffs on their part agreeing to pay all the promissory notes of their father given before September 1, 1876, and to pay the mortgage on the "Kilbury lot," and the amount unpaid on the contract for the "Dorsey lot," and also to support and maintain the two younger children until they should respectively arrive at the age of twenty-one years and then to pay each of them \$150, and to give their father a mortgage for \$1,000 as specified. Soon after the conveyances were executed and delivered as agreed. On the trial it appeared that the plaintiffs had caused to be cut and drawn to the neighboring railroad, for sale to the road after they should have been inspected by the inspector for the railroad, the railroad ties which the plaintiffs had sold on their execution. They had been cut and drawn from the various lots mentioned, and how many were cut upon each lot seemed to be uncertain.

The court held and ruled that the transfer was void under that section of the statute which is contained in the Revised Statutes as the first section of the statute of frauds, and which is in the following words, viz.:

"All deeds of gift, all conveyances and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors existing or subsequent of such person." (2 *R. S.* [2d ed.], 70.)

The counsel for the plaintiffs requested the court to submit to the jury the question whether this transfer was fraudulent, and the question whether the transfer of the land was fraudulent. But the court declined to submit either question to the jury, but held that the transfer was fraudulent and void *per se* under the said section of the statute, and only left to the jury the question of the amount and value of such of the railroad

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ties as had been cut from the "Blakesly lot." To such ruling the plaintiff's counsel excepted, and that is the question presented by the case. We think the learned justice at the circuit erred in his construction of the statute in question. 1. Because the statute, by its terms, only applies to personal property, and could not affect the transfer of the land, and this error was in confining the question submitted to the jury to an investigation of the number and value of the railroad ties which had been, by the plaintiffs, got from the "Blakesly lot;" and, secondly, the statute referred to does not apply to actual sales, whether fraudulent or not, but only to transfers, &c., without consideration, and in trust for the *exclusive benefit of the grantee*, and the transfer in this case did not purport to be of that character.

This section of the statute came under the examination of the court of appeals in the leading case of *Curtis et al.* agt. *Leavitt* (15 N. Y., 9); and in that case judge COMSTOCK, after an exhaustive examination of the statute, holds the following language at page 122 of the case:

"All reasoning and authority, as we have seen, concur in the conclusion that it (the section in question) has no application to cases of real and actual alienation upon valuable consideration, and for active and real purposes, although incidental benefits are reserved to the grantor. There is one other possible interpretation of the statute, and that is the one to which the language points. It is the deed to the use of the grantor which is void, and not the deed to other uses and for other objects. Its true name should be a statute of personal uses; the object is to simply render ineffectual purely nominal transfers of personal estate. Where the entire use and control are, by a declaration of trust, in or out of the instrument left in him who makes the transfer, its policy is not unlike that of the statute concerning passive uses or trusts in lands, which have had, along with this, a contemporaneous existence of some centuries. It is not in any proper sense a statute against frauds, although fraudulent practices may have

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led to its enactment, but it is founded on the self-evident principle that man's property should pay his debts, although he has vested a nominal title in another. For that purpose the statute declares the title to be in the debtor, and no transfer which is entirely nominal can stand in the way. It has no reference to intentions, whether fraudulent or honest. * * * The statute only avoids conveyances which are wholly to the use of the grantor." Judge BROWN, who also delivered an opinion in the same case, after an examination of the statute, and a reference to the case of *Mackie agt. Cairns* (*Hopk.*, 373), and quoting a portion of the opinion of the chancellor delivered in that case says: "These observations exhibit the true rule of construction, and show that the trusts referred to in the section are those mere passive trusts, *exclusively for the use of the grantor*, and where the title of the trustee is purely nominal, and the grantor is to retain the control and enjoyment of the property, and not trusts which are incidental expressed or resulting to the use of the grantor."

It is stated in the series of propositions adopted by the court, at the close of the case of *Curtis agt. Leavitt* (at page 295, *proposition 3*) that the court is "of the opinion that the statute applies only to the conveyances, &c., primarily for the use of the grantor, and not to instruments for other and active purposes, where the reservations to the grantor are incidental and partial." We are of the opinion, therefore, that the learned justice at the circuit erred in holding that the statute in question applied to the case. The transfer was intended to be an actual alienation of the property described in it, and was not a conveyance in trust for the use of the grantor alone, and therefore did not fall within the condemnation of the section of the statute referred to. Aside from the ruling by which it was held that the assignment of the property was, on its face and *per se* void, and considering the amount of the property left in the hands of the father by the mortgage from the plaintiffs to him as compared with the small amount of those debts which were not assumed by the plaintiffs,

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together with the willingness manifested by Daniel, senior, to secure by good, indorsed notes the payment of the plaintiff's debt, and all the other debts then owing by him, we think the evidence presented a question of fact, as whether Daniel Shoemaker, Sr., intended by the transfer of his real and personal property to delay, hinder or defraud his creditors, which should have been submitted to the jury, in accordance with the request of the plaintiff's counsel. We do not see anything in the transfer of the property to the plaintiffs which necessarily operated as a fraud on the creditors of their father.

A new trial is ordered, costs to abide the event.

N. Y. COMMON PLEAS.

In the Matter of the Assignment of MILAN HULBERT and
WILLIAM A. HULBERT, &c.

Assignments — Composition — Upon what the commissions of the assignee is to be estimated — Compensation to attorney of assignee — Code of Civil Procedure, secs. 3252, 3253.

Where upon a composition under the general assignment act, the creditors have agreed to take the notes of the assignors for a per centage of the amount of their respective claims, and when after payment of the expenses, all the property assigned, or the proceeds of it, is restored to the assignors, the five per cent commission upon the value of the estate allowed by law to the assignee is to be estimated upon the aggregate amount of the composition, with the expenses incurred and paid out by the assignee added to it.

In allowing compensation to the attorney of the assignee the court will not go beyond the \$2,000 allowed in the cases provided by sections 3252 and 3253 of the Code of Civil Procedure, unless the nature of the attorney's services is specifically detailed, in order that their value may clearly appear.

Special Term, May, 1881.

A. W. Kent, of counsel for assignors.

S. P. Nash, of counsel for assignee.

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DALY, C. J. — This was an application to set aside an order confirming the report of a referee upon a final accounting of an assignee after a composition under the general assignment act, upon the ground that the assignors had no notice of the proceeding, but were represented in it by an attorney who assumed to act for them without authority.

As the whole estate goes to the assignors after the execution of the composition deed, the delivery of the composition notes and the discharge of the assignee and his sureties upon the accounting, the assignors are entitled to notice of all the proceedings upon the accounting which without it would be irregular. There is a direct conflict in the affidavits as to whether the attorney who appeared for the assignors had or had not authority to act for them; and after the hearing of the motion, the counsel for the assignee and the creditors agreed that, without passing upon that question, the proceedings might be reopened to the extent of considering the validity and propriety of the amount allowed the assignee for his commissions, and for the services of counsel employed by him and the referee's fees, these being the three items in the accounting of which the assignors chiefly complained.

The statute has fixed the amount of the assignee's commission. It declares (*sec. 22, Laws of 1877*) that he "shall receive for his services, a commission of five per centum on the whole sum which will have come into his hands." The words "whole sum," I think, sufficiently indicate that the percentage allowed is to be computed upon a money basis. The word sum, which has many meanings, is here used in one of its most ordinary significations, as a quantity of money or its equivalent in currency, securities or some kind of property. Where the trust created by the assignment has been fully executed according to the terms of the instrument, and the property of every kind and description has been converted into money, which, after the payment of the expenses of the trust, is ratably distributed among the creditors, and the residue, if any, paid over to the assignee, after a final accounting,

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there is no difficulty in determining upon what the per centage is to be computed. It is to be computed upon all that the assignee has received, paid out and distributed. But this is a case of composition, where, in conformity with the provision of the act, the creditors have agreed to take the notes of the assignors for forty per cent of the amounts of their respective claims, and where, after the payment of the expenses, all the property assigned, or the proceeds of it, is restored to the assignors; and there is some difficulty in determining under the act upon what, in such a case, the per centage is to be computed. The assignee claims that the five per cent is to be computed upon the value of the whole of the property assigned, as the value appears in the schedule, which would make the amount of his commissions \$18,117. The referee allowed him \$11,647, upon the actual value of the property, as proved before him, after deducting the Follet notes of \$129,418.60 — that is, upon \$232,941.08.

When the statute declares that the commission is to be five per cent upon the whole sum which shall come into the assignee's hands, it does not mean to limit the allowance to the receipt and payment of money only (*Wagstaff* agt. *Lawrence*, 23 *Barb.*, 226, 227; *Matter of De Peyster*, 4 *Sandf.*, chap. 511; *Bennet* agt. *Chapin*, 3 *Sandf.* [*S. C.*], 673; *Matter of Bunch*, 12 *Wend.*, 280; *Meachem* agt. *Stearns*, 9 *Paige*, 404, 405; *Cairns* agt. *Chaubert, Id.*, 164; *Van Buren* agt. *Chenay Ins. Co.*, 12 *Barb.*, 671), for a composition is allowed by the act, and in the case of a composition very little or no money at all may come into the hands of the assignee. The true rule to be applied is the one laid down by the chancellor in *McWharter* agt. *Benson* (*Hopk.*, 42), and followed in the subsequent cases above cited, that the amount and value of the property which is confided to the trustee, and which passes through his hands, is the basis upon which his compensation is to be computed; that the amount of the estate indicates with sufficient exactness the extent of his labor, care and services, and their reasonable value; that a

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plain rule of calculation is afforded by the amount of the property held in trust, which is comprehensive and simple, and which, in ordinary cases, is a very just criterion of the value of the services of the trustee; that whatever the objections may be to such a rule, all other plans of compensation are exposed to far greater evils, and if it does not accomplish what is just in all cases it is because all human methods are imperfect.

Assuming this to be the rule, the question arises as to how the value of the estate is to be determined in a case of composition, where the value has not been ascertained, as it otherwise would be by the sale or other disposition of the property. The assignee claims that the value must be taken as it is stated to be in the affidavit filed with the schedules; but this, I think, by no means follows. A more reliable and certain estimate of the value, in my opinion, is the aggregate amount of the composition, with the amount added to it that has been incurred for expenses which have been or will have to be paid out in the final accounting. I assume, from the fact of the insolvency, that the amount of the indebtedness was greater than the value of the property, and the creditors having agreed to discharge the insolvent upon receiving forty per cent of the amount of their respective claims, this aggregate amount may be fairly taken as their business estimate of about all that they expected to get from the sale of the assigned property, the collection of the debts and the final disposition of the trust, which, with what is added to it for the expenses incurred and paid out of the estate by the assignee, fairly represents, in my opinion, the value of the estate as a basis upon which to compute the per centage to be allowed the assignee, which will, even then, be a very large sum — about \$6,500 or something over — for the services he has rendered, which practically has been little more than giving security in \$100,000, and paying out some money for expenses, the property having been left in the assignee's charge, who, up to the time of the composition, collected the debts, sold

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such of the stock in trade as has been disposed of, and who alone saw the creditors and got them to enter into the composition.

There is nothing before me to show upon what grounds the referee allowed the assignee's attorney \$2,000, who had previously received \$2,000 from the assignee. The assignee, who is himself a lawyer, advised the assignor that he would have to employ counsel, and Mr. Sutherland says that he was in almost daily consultation with the assignee respecting various matters and questions arising in progress of the trust. The nature of the legal services rendered does not appear by this statement, and it is difficult to conjecture what necessity there could have been for almost daily consultations by the assignee with a legal adviser, under an assignment, in respect to which there has been no contest or controversy, and which terminated in a composition. I assume that Mr. Sutherland may have drawn the composition deed; that he prepared all the necessary papers, and appeared for the assignee on the accounting; and it appears to me that the \$2,000 already paid to him is an ample compensation for all legal services that he could have rendered, unless the nature of them is more specifically detailed than in the papers before me. The utmost that can be allowed under the Code in the cases provided for in sections 3252 and 3253, however difficult, extraordinary or lengthy the litigation may be, is \$2,000, and as this is a legislative expression of the limit of the value of legal services in cases that may and frequently do involve greater labor, difficulty, time and attention than any services that, in my judgment, could have been rendered under this assignment, I shall not go beyond that limit, in the absence of a more specific statement of the services than is now before me, and hold that the additional \$2,000 allowed by the referee cannot be sustained.

The \$500 allowed for referee's fees appear to be large, as there were but four hearings, five witnesses examined and no opposition or contest about any item in the account. Still

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I hesitate to reduce this amount, because the labors of an auditor are different from those of a referee and may require an extensive examination by him of accounts and vouchers, without or after the hearing before him, and the preparation of a report or final accounting involving more labor than the written findings or conclusions of a referee ordinarily are, and, therefore, I do not propose to interfere with this amount, as I cannot say, in respect to the labor or services that may have been rendered, that it is unreasonable.

These are the only three items, as I understand the agreement, that I am to review and pass upon.

SUPREME COURT.

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Fees of referee appointed "to sell real property, pursuant to a judgment in an action" other than an action to foreclose a mortgage — Code of Civil Procedure, secs. 3297, 3307, 3308.

A referee appointed "to sell real property, pursuant to a judgment in an action" other than an action to foreclose a mortgage, is entitled to the same fees as those allowed to the sheriff.

Under section 3307, subdivisions 7 and 11, of the Code of Civil Procedure, the sheriff is entitled to two and one-half per cent upon the sum recovered, not exceeding \$250, and one per cent upon the residue.

The referee is also entitled, under section 3297 of the Code of Civil Procedure (upon distribution), to one-half of an executor's commissions. But he is only entitled to these commissions upon such of the proceeds as he actually distributes or applies.

Special Term, April, 1881.

BARRETT, J. — This is not an action to foreclose a mortgage, consequently the statutory limitation as to referees' fees in such cases does not apply. This case is governed by

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section 3297, Code of Civil Procedure. The referee was appointed "to sell real property, pursuant to a judgment in an action" other than an action to foreclose a mortgage, and his fees under this section are the same as those allowed to the sheriff. Under section 3307, subdivisions 7 and 11, the sheriff is entitled to two and one-half per cent upon the sum recovered, not exceeding \$250, and one per cent upon the residue. It is claimed that section 3308 excludes these provisions in the city of New York; but I think this is not so. That section retains certain special statutory provisions upon the subject, such as are embraced in chapter 569, Laws of 1869, section 2, and in chapter 192, Laws of 1874. But none of these special statutory provisions seem to affect the question. Upon looking at the provisions of chapter 569, Laws of 1869, section 2, we find that they only refer to sales in foreclosure; while chapter 192, Laws of 1874, fixes the fees, not of the sheriff, but of "any officer other than the sheriff." The latter act, therefore, is not a "special statutory provision relating to the fees of the sheriff of the city and county of New York," while so far as it relates to the fees of officers other than the sheriff — *e. g.*, referees — it is modified by the general and comprehensive provision of section 3297. I am of opinion, then, that section 3307, subdivisions 7 and 11, applies to sales of real estate pursuant to judgments other than in foreclosure. It would seem, therefore, that the first two items of Mr. Pattison's bill are in accordance with the law. He is also entitled, under section 3297 (upon distribution), to one-half of an executor's commissions. But he is only so entitled to these commissions upon such of the proceeds as he actually did distribute or apply. What he paid over to the chamberlain was not, in my judgment, so distributed or applied within the meaning of the section.

The bill must be reduced accordingly, and, as so reduced, allowed.

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SUPREME COURT.

LYSANDER W. COFFIN agt. THE PROSPECT PARK AND CONEY
ISLAND RAILROAD COMPANY.

*Injunction — Code of Civil Procedure, section 626 — Practice on application
to the general term under this section to vacate.*

Under the provisions of section 626 of the Code of Civil Procedure, the application to this court to vacate an injunction shall be *ex parte*, and wholly based upon the papers upon which the order was granted. The Code does not contemplate a hearing of both parties on such an application.

Where the injunction order was merely preliminary to an order to show cause why the injunction should not be continued, which order is still pending before the special term, the order of the general term should not interfere to prevent its hearing. On such hearing the parties may present additional facts affecting the right to the injunction and its continuance.

First Department, General Term, May, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

IN this suit judge DONOHUE granted a preliminary injunction pending a hearing upon an order to show cause why it should not be continued, restraining the construction of the new iron pier at Coney Island. The general term is asked, under section 626 of the Code of Civil Procedure, to vacate the injunction.

W. De Witt, for motion.

G. W. Wingate, opposed.

PER CURIAM.— The injunction order in this case was merely preliminary to an order to show cause why the injunction should not be continued. That order was returnable on the

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twenty-third instant, and is now pending before the special term. The order of this court should not interfere to prevent its hearing. On such hearing the parties may present additional facts affecting the right to the injunction, and its continuance, not now before us.

Under the provisions of section 626 of the Code, the application to this court should be *ex parte* and wholly based upon the papers upon which the order was granted. The Code does not contemplate a hearing of both parties on such an application. In directing notice in this case the court went beyond the proceeding contemplated by the Code, and its action in that respect will not be deemed a precedent for future cases.

Upon the original papers a *prima facie* case for an injunction was shown. We cannot say that the justice exceeded his powers in granting the order. We cannot regard it, therefore, as invalid and set it aside for that reason. The case as presented by the papers was one, however, upon which it would have been better to have required notice of the application before granting the order. We feel it our duty, therefore, to so modify the injunction order that the hearing may be had upon the order to show cause at special term without delay, and yet the defendants not be prevented from proceeding with the construction of the pier in the meantime.

Our order will, therefore, so far modify the injunction as to suspend its operation till such hearing of the motion to continue the same, and the decision thereof.

The plaintiffs will have it in their power to proceed at once under the direction of the special term, and will be fully protected if that court shall conclude that the injunction should be granted.

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U. S. CIRCUIT COURT.

SAMUEL REGESTER, administrator, agt. HARRY E. DODGE,
executor.

Partnership — Liability of a member of an old firm for a debt contracted with such firm, where the same has been dissolved and a new firm formed, who assumes all liabilities of the old firm, and agrees that liability of retiring members shall be terminated — Facts which are sufficient to warrant the conclusion that the liability of the new firm was accepted by the creditors.

When the dissolution of an old firm has occurred, and a new firm has agreed to assume the liabilities of the old firm, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has notice of the dissolution and of the agreement by the new firm, to accept the liability of the new firm in place of the liability of the old.

At the time of the deposits for which this action was brought, the banking firm of J. C. & Co. was composed of several persons, among whom were J. W. S. and E. D. This firm dissolved January 1, 1871. J. W. S. and E. D. then retired from the business, and a new firm was formed, consisting of the remaining members of the old firm and two new members. The new firm succeeded to the business of the old firm, the account with the retiring members was made up and settled, and the new firm then assumed all the obligations of the old firm, and agreed that the liability of the retiring members should be terminated. The new firm continued business until November, 1873, when it was adjudged a bankrupt. Among the debts of the new firm, published in the bankruptcy proceedings, was the debt here sued on, which debt was, without objection, proved as a debt of the new firm, in the bankruptcy proceeding of that firm, by the representative of D. R. Upon this debt so proved, dividends were, from time to time, declared out of the assets of the new firm, and the same received by the representative of D. R. In 1879, the estate of the new firm was wound up under the direction of trustees, in accordance with the provisions of the bankrupt law, and the stocks then constituting the assets of the new firm were distributed among the creditors of that firm in pursuance of a scheme assented to by the creditors. E. D. died in 1877. During his lifetime no claim of liability for the deposits was made upon him. In September, 1878, and prior to the distribution of the stocks, payment of this debt was demanded by the representative of D. R., of the executor of E. D., who then denied the existence of the debt as a liability of E. D. Thereafter the representative of D. R. participated in the distribution of the

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stocks belonging to the new firm, and, as a creditor of that firm, received sundry shares of various stocks, which he forthwith sold at private sale, without notice to the executor of E. D. The amount of the cash dividends received from the estate of the new firm, together with the amount realized from the sale of the stocks distributed by the direction of the trustees of that firm, not being equal to the amount of the deposits made in 1869 by D. R., this action is brought by his representative to charge the estate of E. D. with the deficiency:

Held, that by the deposit made in 1869 with the old firm J. C. & Co., E. D., then a member of that firm, became liable for the amount thereof. That liability continues, unless facts be shown from which an intention on the part of the creditor to accept the liability of the new firm in lieu of the liability of the old firm can be fairly inferred.

Held, further, that the circumstances in this case tends to show assent by the plaintiff to the novation of the debt sued on.

The adoption of the new firm as the debtors, coupled with the omission, during the lifetime of the retired partner, to indicate, by word or deed, the existence of a liability on his part for the debt in question, and coupled with the lapse of time that occurred before the liability of the retired partner's estate was asserted, is sufficient to justify the inference that the new firm was adopted as debtor, with the intention that the liability of the firm was to stand in place of the liability of the old:

Held, also, that having, without cause, delayed asserting the liability of the outgoing partners during a period of some five years, whereby the party was deprived of an opportunity to take part in the bankruptcy proceedings of the new firm, and to reimburse himself from the estate of that firm the plaintiff cannot now ask a court of equity to exercise its power in his behalf. The right here claimed is an equitable right only, and it may, therefore, be met by equitable circumstances.

Eastern District of New York, February, 1881.

THE facts are sufficiently stated in the opinion.

Henry S. Bennett, for defendant.

I. The letters of administration issued to the complainant are void, because there was no ground for issuing the process. Attached to these letters is the evidence upon which the surrogate acted in issuing them. That evidence is totally defective. The rule of law upon this point appears in the case of *Staples agt. Fairchild* (3 *N. Y. R.*, 41-46); *Roderigas agt. East River Savings Institution* (63 *N. Y. R.*, 464; affirming 43 *Superior Court*, 217).

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II. The foundation of the plaintiff's claim is the two certificates. But at the time that Mr. Dodge was a member of this firm these two certificates had been returned to, or were in possession of that firm. When Mr. Dodge retired from that firm he left them in possession of the new firm, with whom they remained for five years. The presumption of law is, that these certificates were paid. So far from proving a debt against that firm, the fact of their being in the possession of the firm who issued them proves the extinguishment of the claim. The only evidence in the case that rebuts that presumption is the testimony of the complainant of the declarations or admissions of Jay Cooke, made five years after the retirement of Dodge from the firm. This evidence is inadmissible, we claim, as against Mr. Dodge (*Wharton's Law of Evidence*, vol. 2, sec. 1196). "After dissolution of the partnership, the power to bind by admission ceases." Particularly is this so when the effect of such a declaration by one partner is to throw the indebtedness on the other (*Very agt. Watkins*, 23 *How. [U. S.] Rep.*, 469). To the same effect is the *Bank of Vergennes agt. Cameron*. In that case judge HARRIS (on page 149 of 7 *Barbour S. C. R.*) says: "The admission of Baker cannot be allowed as against Cameron, for it was subsequently proved that the partnership between Baker and Cameron had been dissolved before such admission was made." Also in *Walden agt. Sherburne* (15 *Johns. R.*, 424) judge SPENCER says: "One partner cannot, after a dissolution, bind his co-partner by acknowledging an account, any more than he can give a promissory note to bind him." To the same effect is *Hackley agt. Patrick* (3 *Johns.*, 536); *Baker agt. Stackpoole* (9 *Cow.*, 419); *Van Keuren agt. Parmelee* (2 *N. Y. R.*, 523; overruling *Patterson agt. Choate*, 7 *Wend.*, 441), and *Johnson agt. Beardsley* (15 *Johns.*, 3).

III. The complainant obtained possession of these certificates without the knowledge or consent of Mr. Dodge, but solely through the act and authority of one Edwin M. Lewis, the trustee in bankruptcy of a firm with whom Mr. Dodge

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had had no connection for five years (*Arnold* agt. *Camp*, 12 *Johns.*, 409). This trustee undertook and assumed to adjudicate upon the rights of Mr. Dodge, upon evidence which he thought sufficient, without notifying Mr. Dodge, or giving Mr. Dodge any opportunity to be heard. Had not Mr. Lewis exercised this power of delivery, the complainant would have had no standing in court as against Mr. Dodge. Whether he exercised that power rightly this court has no means of determining, except the reported opinion of Mr. Jay Cooke, whom the complainant has not thought proper to examine.

IV. The complainant, by proving his claim against the new firm, including Messrs. Garland and Jay Cooke, Jr., who were not members of the old firm, must be deemed in law to have acquiesced in the arrangement made in 1871, under which the new firm assumed all the liabilities of the old firm, and released Messrs. Dodge and Sexton therefrom. If he had intended to hold Messrs. Dodge and Sexton he should have proved his claim against those members of the firm only who were members when the certificates were issued. The form of his proof, his acceptance of the dividends no less than his omission to call upon Mr. Dodge during his lifetime, create the presumption and constitute proof of his election to hold his successors liable for the debt. No such assent was directly given, but the circumstances that imply such assent are set forth in the following cases. The courts construe with considerable liberality the question of assent (*Hart* agt. *Alexander*, 2 *M. & W.*, 484; *Harris* agt. *Lindsay*, 4 *Wash. C. C.*, 98-271; *Deland* agt. *Amesbury Co.*, 7 *Pick.*, 241; *Benson* agt. *Hadfield*, 4 *Hare*, 32).

V. The complainant cannot maintain this action because he has not exhausted his remedy against John W. Sexton, nor has he made him a party defendant to this action, nor has he proved his insolvency. On the contrary, it affirmatively appears that ever since the dissolution he has been a banker doing business in Philadelphia.

VI. The settlement which the complainant made with the

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legal representatives of the firm without notice to, or knowledge of Mr. Dodge or his legal representatives, bars his recovery in this action. His duty was to notify Mr. Dodge, before he compromised with that firm. If Mr. Dodge is liable for this claim, his liability was that of surety (*Calvo* agt. *Davies*, 73 N. Y., 216).

VII. The complainants sale of the stocks, which he accepted from the firm in payment of the claim, without notice to Mr. Dodge of the time and place of that sale, or without giving Mr. Dodge an opportunity to exercise the privilege of buying the stock, clearly bars his recovery. He sold those stocks at private sale, and because his sisters were clamoring for money. If his present claim be well founded, Mr. Dodge had an interest in those stocks, and the right to reasonable notice of when and where they were to be sold. The evidence shows, that if he had retained those stocks a few months longer, the proceeds of the sale would have more than met the claim. The complainant had, therefore, no right to sacrifice or peril the rights of Mr. Dodge by a sale without notice to him.

VIII. If the declarations of Mr. Cooke bind this defendant, then the fact appears that David Regester, in January, 1869, forced upon the firm a bailment. In other words, Jay Cooke & Co. became, against their will and protest, bailees of certain property belonging to Mr. Regester. The latter's hasty and continued disappearance rendered the firm powerless to take any such steps as the law imposes upon them to be relieved from liability. This firm remained as such involuntary bailees for nine years, and the defendant, Dodge, was forced to maintain that relation for eight years, until the period of his death. Under this state of facts, it is respectfully submitted this claim, as against Edward Dodge, is barred by the statute of limitations. Although when the certificates were first given to Regester, no right of action existed until he demanded the money and returned the certificates, yet this legal condition was changed when he threw the certificates on

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the counter, without affording Cooke & Co. an opportunity to reject or accept them, for by this action Register could not force upon Cooke & Co. the character of bailee for custody, and their charge of them was that of those coming to the possession of abandoned property. At any time a mere suit by Register for their recovery would have been sufficient demand, just as a suit is itself a sufficient request for money payable to the suitor on demand. The statute began to run against him and his representatives from the time the certificates were thrown on the counter (more than six years ago), and the right asserted on behalf of Register is barred.

IX. This act of Register in returning the certificate to Jay Cooke & Co., and suddenly disappearing, destroyed his right to claim interest from that date. The firm became liable for the principal only. The contract created by the issue of those certificates was terminable at the pleasure of either party. Register could not compel them to pay interest forever, by refusing to withdraw his deposit. His act of returning them, and of keeping out of their reach, must be construed as a termination of the contract, and henceforth they sustained to him only the relation of bailee without hire.

X. The bill should be dismissed and judgment should be directed to be entered in favor of the defendant.

BENEDICT, *J.* — In this case I have listened to a reargument, and have re-examined the question upon which, as I suppose, the case turns, and my opinion remains unchanged that the plaintiff is not entitled to recover. The earnestness of the contention made in behalf of the plaintiff, has impelled me to state at length the reasons of my conclusion.

The action is a suit in equity, brought by the administrator of David Register, who disappeared in the year 1870, and is supposed to be dead, against Harry E. Dodge, executor of Edward Dodge, for the purpose of charging the estate of Edward Dodge with the amount of certain deposits of money made by David Register in the year 1869, with the firm of

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Jay Cooke & Co., of Philadelphia, of which firm Edward Dodge was then a member.

The material facts are as follows :

At the time of the deposits in question, the banking firm of Jay Cooke & Co., of Philadelphia, was composed of William G. Morehead, Henry D. Cooke, Pitt Cooke, George C. Thomas, Harry C. Fahnestock, John W. Sexton and Edward Dodge. This firm dissolved January 1, 1871. John W. Sexton and Edward Dodge then retired from the business, and a new firm was formed, consisting of the remaining members of the old firm and two new members, Jay Cooke, Jr., and James A. Carhart. The new firm succeeded to the business of the old firm, the account with the retiring members was made up and settled, and the new firm then assumed all the obligations of the old firm, and agreed that the liability of the retiring members therefor should be terminated.

The new firm continued business until November 26, 1873, when it was adjudged bankrupt. Among the debts of the firm, published in the bankruptcy proceeding of that firm, was the debt here sued on. In June, 1873, this debt was, without objection, proved as a debt of the new firm, in the bankruptcy proceedings of that firm, by the representative of David Register.

Upon this debt, so proved, dividends were from time to time declared out of the assets of the new firm of Jay Cooke & Co., and the same received by the representative of David Register. In the year 1879 the estate of the new firm was wound up under the direction of trustees, in accordance with the provisions of the bankrupt law, and the stocks then constituting the assets of the new firm were distributed among the creditors of that firm, in pursuance of a scheme assented to by the creditors.

Edward Dodge died in 1877. During his lifetime no claim of liability for the deposits in question was made upon him in any form, so far as appears. In September, 1878, and prior to the distribution of the stocks by the trustees of the

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new firm, payment of this debt was demanded by the representatives of David Register of the executor of Edward Dodge, who then denied the existence of the debt as a liability of Edward Dodge. Thereafter the representative of David Register participated in the distribution of the stocks belonging to the new firm of Jay Cooke & Co., made by the trustees thereof, and as a creditor of that firm received sundry shares of various stocks, which he forthwith, and on June 12, 1879, sold at private sale, without notice to the executor of Edward Dodge. The amount of the cash dividends received from the estate of the new firm, together with the amount realized from the sale of the stocks distributed by direction of the trustees of that firm, not being equal to the amount of the deposits made in 1869 by David Register, this action is brought by his representative to charge the estate of Edward Dodge with the deficiency.

The law of the case is not doubtful. By the deposits made in 1869 with the old firm of Jay Cooke & Co., Edward Dodge, then a member of that firm, became liable for the amount thereof. That liability continues, unless facts be shown from which an intention on the part of the creditor to accept the liability of the new firm in lieu of the liability of the old firm can be fairly inferred. The question, therefore, is, whether the facts above stated are sufficient to warrant the conclusion that the liability of the new firm was so accepted by the plaintiff.

In disposing of questions of this character, courts have frequently held, that when the dissolution of an old firm has occurred, and a new firm has agreed to assume the liabilities of the old firm, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has notice of the dissolution and of the agreement by the new firm, to accept the liability of the new firm in place of the liability of the old. In *Ex parte Williams* (Buck., 13), the court speaking of such a case say: "A very little will do." In *In re Smith, Knight & Co.* (L. R., 4 Ch.

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App., 66), the lord justice says: "There is no doubt whatever that if you have an old firm, and either a new partner is taken into it or a new firm constituted, and the assets are taken over by the new firm, and the customer knowing all these things, afterwards goes on and deals with the new firm, you infer assent on his part from slight circumstances." In *In re Family Endorsement Soc. (L. R., 5 Ch. App., 118)*, speaking of a case very like the present, it was said: "Very slight evidence, indeed, would be required to establish that the creditor had taken the liability of the new firm instead of the old."

What then are the circumstances in this case tending to show assent by the plaintiff to the novation of the debt sued on? In the first place it will be observed that from the time of the publication of this debt as a debt of the new firm of Jay Cooke & Co., the creditor—and the representative of David Register was then the creditor, authorized to collect and to discharge the debt—knew that the old firm of Jay Cooke & Co., had dissolved; that Edward Dodge and John W. Sexton had retired from the business; that a new firm had been formed, containing members who were not members of the old firm; and that such new firm had agreed to assume all the liabilities of the old firm. The creditor is also chargeable with the knowledge that the purpose of this agreement made by the new firm was to relieve the outgoing parties from their liability for the debts of the old firm. The nature of the agreement itself discloses that to be its object.

This knowledge on the part of the creditor is not without significance in ascertaining his intention. If it had been the intention of the creditor to maintain intact the then existing liability of the retired partner, such an intention would naturally have evoked from the creditor, when he came to deal with the new firm, in respect to this debt, some positive expression of a purpose to avoid a substitution of the liability of the new firm in place of the liability of the old. The proofs here fail to show that any expression of such a purpose in any form escaped from this creditor.

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The next circumstance deserving attention is the time which elapsed before any attempt was made to enforce the debt as a subsisting liability of Edward Dodge. The deposits sued on came to be known at the time of the bankruptcy of the new firm of Jay Cooke & Co., in 1873. Edward Dodge lived until 1877 without the suggestion of a continuing liability on his part for this debt from any source. There is no evidence that he was insolvent or absent; and the omission to make a claim upon him in his lifetime, the other members of the old firm being insolvent, is hardly consistent with the position now assumed, that there was no intention to accept the liability of the new firm in lieu of the old. Furthermore, no claim was made of the executor of Edward Dodge until September, 1878, when the estate of the new firm of Jay Cooke & Co. was substantially wound up, which seems to indicate that the making of the demand upon the executor of Edward Dodge had some connection with the result of the bankruptcy proceedings of the new firm, and gives rise to the suggestion that the intention to maintain a liability on the part of Edward Dodge was an afterthought.

In cases of this description, delay in asserting the liability of an outgoing partner, when coupled with a dealing with the new firm, has often been deemed to be a circumstance tending to show an intention to discharge liability of the old. In *In re Smith, Knight & Co.*, already cited, it is said: "The time which has elapsed may be more material."

The next circumstance deserving attention is of more significance. Indeed, it is one that in some of the cases has been considered to be of itself conclusive. This circumstance is that when the existence of these deposits was disclosed in the bankruptcy proceeding of the new firm, the creditor, knowing that he was dealing in respect to the assets of a new firm which had agreed to assume the debts of the old firm for the purpose of extinguishing the liability of the old firm, adopted the new firm as his debtors for this very debt. This he did in the most formal way by proving the deposit made

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by David Register with the old firm as a debt of the new firm. The proof was not of a liability by reason of property or money received by the new firm, to be applied to the discharge of debts of the old firm; but the original deposits were proved as a ground of liability. This adoption of the new firm as the debtors, coupled with the omission during the lifetime of the retired partner to indicate by word or deed the existence of a liability on his part for the debt in question, and coupled with the lapse of time that occurred before the liability of the retired partner's estate was asserted, appear to me to be sufficient, according to the requirements of the cases already cited, to justify the inference that the new firm was adopted as debtor, with the intention that the liability of the firm was to stand in place of the liability of the old.

In some of the adjudged cases less proof than is here presented has been considered sufficient to warrant a similar inference.

In *Hart agt. Alexander* (2 *Mee. & Wels.*, 489), FOLLETT, *arguendo*, says: "If the creditor by some positive act adopts a new firm as his debtor the retired partner is discharged." And lord ABINGER, in giving judgment, states as the result of the cases, that: "If a new partner comes in and an account is accepted in which the new partner is made liable for the balance, that discharges the old firm, as both cannot be held liable at once for the same debt."

In *In re Medical Invalid and General Life Assurance Soc.* [*Spencer's case*], 24 *L. T. R.*, 455, the circumstance that the new company and the customer had treated each other as insurer and insured, was held to be "complete evidence of novation."

In *In re Smith, Knight & Co.*, already cited, the case was made by the master of the rolls to turn upon the question whether the company had been adopted as debtor. He says: "I am of the opinion there was an adoption of the company as the debtor, and that it cannot be treated otherwise. It is useless to go into cases, because it is admitted that very small

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things will do." The decision of the master of the rolls in that case was reversed by the court of appeals, upon the ground that the circumstance from which the master of the rolls found that there had been an adoption of the company as debtor was not sufficient to warrant that conclusion; but there was no dissent from the proposition of the master of the rolls that an adoption of the company as debtor by the creditor, with knowledge, was a fact decisive of the case.

In *Kerwin* agt. *Kerwin* (2 *Crompt. & Mee.*, 627), the opinions of LYNDHURST and BOLLAND proceed upon the assumption that the consent of the creditor to take the new firm as debtors would be conclusive. In *Brown* agt. *Gordon* (16 *Beavan*, 309), great stress is laid upon a fact, which appears in this case also, that the partners had settled with each other, treating the debt as a debt of the new firm.

The conclusion that a novation of the debt in question was affected, and the liability of Edward Dodge therefor extinguished, is not at variance with any of the cases upon which the plaintiff relies. In *Harris* agt. *Farwell* (15 *Beavan*, 31), the creditor proved against the new firm an original obligation of the new firm, based upon money paid the new firm to the use of the creditor. The case is made to turn upon the particular form of the proof of debt. In *Hall* agt. *Jones* (56 *Ala.*, 493), it is said: "Proof, if made, that the accounts against the old firm were restated against the new, would be strong evidence from which an agreement (to release the retired partner) might be inferred." In principle, that is this case. The debt due from the old firm of Jay Cooke & Co., was by the creditor restated against a new firm, and that for the purpose of sharing in the distribution of the estate of a firm known to be in nowise liable for the debt, except by reason of an agreement to assume it, made for the purpose of releasing their retired partner from liability.

In *Heath* agt. *Hall* (4 *Taunt.*, 352), the case put is that of proving the joint debt in the bankruptcy proceedings of one of two joint debtors, and suing the other debtor in an action

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at law. This is not such a case. In *Devagnes agt. Noble* ([*Sleich's case*], *Merivale*, 562), the question decided was whether delaying for the space of eight months after the death of one partner, and meanwhile accepting part of the debt from the surviving partners, who were liable for the whole, was evidence of the transfer of the credit to the surviving partners.

In *Daniels agt. Cross* (3 *Ves. Jr.*, 277), the only act done, as stated by the court, was receiving interest from the surviving partners.

In *Harris agt. Lindsay* (4 *Wash. C. C.*, 100), the liability of the outgoing partner was clearly shown to have been extinguished, and so the court decided. It is there said (page 273) that no delay to pursue the outgoing partner which falls short of an agreement, express or implied, to take the paying partner as a debtor, will discharge the retiring partner; and the decisive question is stated to be whether the plaintiff had conformed to the agreement made between the parties at the dissolution; and the decisive fact considered to be that the paying partner was to be credited with the notes when paid. In the present case we have an express adoption of a new and different firm as the debtors, and a credit to that firm of part payment of the debt.

It is not seen that any difference arises from the circumstance that the acquiescence in the arrangement made between the old firm and the new for a transfer of the liability of the old debts to the new firm occurred after the new firm had become bankrupt, and not before. No inference is created by that delay, because David Regester, the depositor, disappeared before the new firm was formed, and the existence of the deposits was not known until the bankruptcy. The representative of David Regester, upon learning of the debt and of the agreement by the new firm to assume it, had the right to take the benefit of that agreement, and to accept the new firm as debtors in place of the old firm. The acts and omissions under consideration were, in law and in fact, those of the creditor, and so they have been treated here.

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I now proceed to consider this case in another aspect, which, as it seems to me, is also fatal to the plaintiff's claim.

The suit is in equity. The plaintiff applies for equitable relief, but his claim is inequitable. This plainly appears. In 1873, when the new firm of Jay Cooke & Co. went into bankruptcy, and the plaintiff was called on to act in respect to the debt sued on, it was open to him at once to assert the liability of Edward Dodge for the debt in question. Had he then done so, and had the liability of Edward Dodge been then established, a right on the part of Edward Dodge to become a creditor of the new firm in the bankruptcy proceedings would have arisen. This was a substantial right lost to Edward Dodge by unexcused delay on the part of the plaintiff. Still more, if, instead of dealing with this debt as an existing liability of the new firm alone, the liability of Edward Dodge had been asserted and maintained before the estate of Jay Cooke & Co. was wound up, those shares of stock which the plaintiff received for this debt would have passed to Edward Dodge or his representative, with, of course, the election to sell or to hold them. It is obvious that the distribution of those stocks was not made for the purpose of enabling the creditors to turn them at once into money. That could have been done by the assignee in bankruptcy. The object of the distribution was to give the creditors an election to sell or to hold these stocks. This, too, was a substantial benefit. Its value in this case appears by the fact that the stocks distributed to the plaintiff, as creditor of the new firm, are now equal in value to the debt proved against the new firm by the plaintiff. The plaintiff has seen fit, without any cause assigned, to adopt a course by which the right to vote as a creditor in the bankruptcy proceeding was lost to Edward Dodge, and his representative deprived of the power to secure his estate against loss.

Having, without cause, delayed asserting the liability of the outgoing partners during a period of some five years, whereby the party was deprived of an opportunity to take part in the

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bankruptcy proceeding of Jay Cooke & Co., and to reimburse himself from the estate of that firm, the plaintiff cannot now ask a court of equity to exercise its power in his behalf. The right here claimed is an equitable right only, and it may therefore be met by equitable circumstances (*Ex parte Kendall*, 17 *Ves.*, 522).

I have not overlooked the fact that the defendant did at one time make demand on the representative of Edward Dodge for the payment of the debt now sued on. But this demand was not made until 1878, when the distribution of the estate of Jay Cooke & Co. had been determined upon, and when made it was not enforced; on the contrary, the defendant's denial of liability was apparently acceded to, for the plaintiff commenced no suit at that time, and after that time received the stocks distributed by the trustees of Jay Cooke & Co., and sold them at private sale without notice. . .

Attention should also be called to the fact that the plaintiff makes no tender of the stocks he so received. He who asks equity must do equity. If at this late day the estate of Edward Dodge is to be charged with the debt in question equity demands of the plaintiff that he transfer to the estate of Edward Dodge the stocks which Edward Dodge would have been entitled to receive if his liability had been asserted in his lifetime. The plaintiff does not do this. All that he offers is to credit the amount of the cash dividends and the proceeds of the private sale of those stocks. Manifestly, in view of the evidence respecting the value of those stocks, it would not be for his advantage to make tender of them now. But only in that way can he do equity. Failing to do this, his prayer cannot be granted.

Let an order be entered dismissing the bill, with costs.

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N. Y. COMMON PLEAS.

WRIGHT E. POST agt. ETTA A. MORAN and SELINA NILES.

Ejectment—practice in actions of, as to new trial—Code of Civil Procedure, section 1525.

The Code of Civil Procedure has not changed the former practice, in actions of ejectment, of making an order (before judgment is perfected) that when the judgment is perfected it be thereupon vacated, and a new trial ordered without further order of the court.

Special Term, May, 1881.

THE plaintiff in April, 1880, leased the premises No. 18 West Twenty-first street to defendants for three years from the first day of May ensuing, by a sealed instrument in which was a clause that "the party of the second part covenants that she will not assign this lease, nor let nor underlet the whole or any part of said premises, without the written consent of the party of the first part, under penalty of forfeiture and damages." But prior to the execution of the lease, Mrs. Moran said to plaintiff's agent, with whom she transacted the business, that her health was not good, and that if she did not succeed in letting the rooms she would want to sublet the house, and he replied that she could do that. This suit was brought to eject defendants for violation of the covenant in the lease, and defendants interposed an equitable counter-claim to have the instrument reformed by striking out the covenant. Judge VAN BRUNT gave judgment dismissing the counter-claim. Defendants then obtained an order for a new trial under the statute, which plaintiff moves to set aside.

J. F. DALY, J. — It appears that the trial judge, judge VAN BRUNT, passed upon no questions except those decided by the order he made on May 9, 1881, and that the order obtained from me by defendant on May 12, 1881, must stand or fall upon the regularity of defendant's application.

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The case of *Cook* agt. *Passage* (4 *How.*, 360) is authority for the practice, in actions of ejectment, of making an order before judgment is perfected, that when the judgment is perfected it be thereupon vacated and a new trial ordered without further order of the court.

It is contended by plaintiff that the Code of Civil Procedure does not permit this practice, because, while the Revised Statutes provided that the order for a new trial might be made within three years after the judgment is rendered (2 *R. S.*, 309, *sec.* 37), the Code of Civil Procedure provides that it may be done within three years after the judgment is rendered and the judgment roll is filed (*Code*, *sec.* 1525).

It does not seem to me that the alteration in the language of the statute is significant of an intention on the part of the legislature to change the practice as to when the order granting a new trial may be made, but rather to fix with greater certainty the exact date from which the absolute right to a new trial runs, and not to exclude the defeated party from the advantages which he gets by anticipating the entry of judgment—*i. e.*, the retaining possession of the disputed premises by preventing his adversary issuing execution to enforce the judgment.

The codifiers had no intention to alter the practice by inserting the words, "and the judgment roll is filed," for it appears from their notes to sections 1524 and 1526 that the inserting these words was intended as a substitute in those sections for previous provisions of law as to "docketing" such judgments, and the new provision was evidently inserted in section 1525 to make all the sections uniform on that subject (*See edition of the Code of Civil Procedure, with notes by M. H. Throop*, 1880).

The practice, therefore, established in the case first cited seems to be proper.

Motion to vacate the order of May 12, 1881, denied, with ten dollars costs.

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SUPREME COURT.

MAXIMILIAN FLEISCHMANN and others, appellants, agt. EMIL STERN, respondent.

Promissory note—Maker and indorser—Action brought against both where maker fails to answer, proceedings in—Usury—when indorser estopped from setting up—Complaint—Amendment—Estoppel—when doctrine does not apply.

Where an action is brought against the makers and indorser of a promissory note, and the makers fail to answer and a judgment of severance is entered against them, pursuant to section 456 of the Code of Civil Procedure:

Held, that the action thereafter may be treated as though the indorser had been sued alone.

Where the defendant, as indorser of an accommodation note, got his creditor to discount it at a usurious rate of interest, in payment of a past indebtedness upon the statement that it was business paper:

Held, that he was estopped from setting up usury, and that the case of *Payne agt. Burnham* (62 N. Y. R., 69) was no authority, as the passing of the note operated as a payment *sub modo* of the indebtedness until the maturing of the note.

Where an action is brought against the indorser of a promissory note, who was the original debtor, and the complaint states that he was indebted to the plaintiffs for goods sold and delivered in an amount about equal to the note, and that was proved by the defendant:

Held, that it was the duty of the judge before whom the action was tried, to direct a verdict for the amount of the goods, and, if an amendment to the complaint were necessary, to have ordered it on the spot.

APPEAL from judgment on verdict directed by the court, and from order denying motion for new trial on the minutes.

C. Bainbridge Smith, for appellants.

A. R. Dyett, for respondent.

DAVIS, P. J. — By the default of the respondent's codefendants and the judgment entered thereon, and the order of severance pursuant to section 456 of the Code, this action is to be

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treated as though the respondent had been sued alone. The complaint alleges that the respondent, being indebted to the plaintiffs for goods and merchandise in the sum of about \$1,000, delivered to the plaintiffs therefor a promissory note of Z. Stern & Co., a copy of which note is set out in the complaint, and that the respondent thereupon indorsed and guaranteed the payment of the note; that when the note became due it was presented at the place where it was payable and payment duly demanded and refused, and thereupon the note was protested and the respondent duly notified. It then alleged that there was due and owing to the plaintiff, on the note, the sum of \$1,000, and interest from the 16th of January, 1878, and proceeded to demand judgment for the sum of \$1,000, with interest. The answer admits, by the absence of denial, the several allegations of the complaint. It sets up as a defense to the note that it was made by Z. Stern & Co., without any consideration whatever, for the accommodation of the respondent, and that the respondent indorsed and delivered the same upon a usurious agreement, under which the plaintiffs are alleged to have discounted the note at a greater rate than seven per cent per annum, wherefore the respondent insists that the note was usurious and void. On the trial the respondent, having the affirmative under the pleadings, put in evidence and proved the account of the plaintiffs against him for goods sold and delivered, amounting to \$941.92, and that the note of Z. Stern & Co. was discounted by the plaintiffs, by the application of the same as a credit upon said account, at a discount of nine per cent for interest thereon for the time the note had to run; that the amount of the account was \$941.92, and that the proceeds of the note at such discount were \$977.75, leaving a balance in favor of the respondent, over and above the account, of thirty-five dollars and eighty-three cents, for which he was then credited in the books of the plaintiffs, and that subsequently that balance was applied in part payment of another bill of goods sold to him by the plaintiffs.

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It was shown that the note was in fact accommodation paper, for which the makers received no consideration. On the part of the plaintiffs evidence was given tending to show that the note was represented by the respondent as business paper, given by the makers to him for bills receivable then delivered by the respondent to them.

At the close of the testimony the court ruled that there was no question of estoppel to be submitted to the jury, the respondent having assented to the direction of a verdict for the plaintiffs for thirty-five dollars and eighty-three cents and interest, which was the balance credited to him, and subsequently applied as aforesaid. To this ruling the plaintiffs excepted. The plaintiffs asked the court for a direction that they were entitled to a verdict for the amount or value of the goods sold, and the plaintiffs also asked to go to the jury as to whether the respondent represented to the plaintiffs at the time the note was discounted that it was a business note. Both these requests were overruled and due exceptions taken. The court then directed a verdict for the plaintiffs for thirty-nine dollars and sixteen cents. Afterwards, upon due notice, a motion was made upon the grounds specified in the notice for a new trial upon the minutes of the court. The motion was afterwards heard and denied, and an appeal is taken from such denial.

The court held that there was no room for the application of the doctrine of estoppel in this case, because the existing indebtedness of the plaintiffs could not be considered as an advancement in reliance upon the representations of the respondent. This ruling was based upon *Payn agt. Burnham* (62 N. Y., 69), where the court held that a payment of a part of the purchase-money on the usurious sale of a mortgage which had been paid before any representation as to the character of the mortgage had been made, could not be considered as having been induced by the representations, and, therefore, was not affected by the doctrine of estoppel *in pais*. That case is not, however, an authority for the ruling of the court below, for it does not hold that a representation as to

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the character and validity of a note payable *in futuro*, which is delivered and received to apply upon a prior indebtedness, and which operates of necessity as a payment *sub modo* of such indebtedness until the maturity of the note, cannot be an estoppel against the allegation of usury. What the party who makes the representation gains, and induces the other party to part with, is the extension of the time of payment, for it is settled that a party receiving such a paper, though it be usurious, cannot avail himself of the fact to enforce the original indebtedness until after the instrument matures, or until it be repudiated as usurious by its makers or indorsers (*Barrington agt. Wagner*, 33 *N. Y.*, 31, and cases there cited).

The respondent, therefore, in this case, assuming that the representations claimed by the plaintiffs were in fact made, gained, according to these authorities, the absolute right to insist that the original indebtedness to the plaintiffs on the account was extinguished, or its payment extended until the note should become due and be dishonored; and having secured to himself and enjoyed the benefits which were, according to the authorities, a valuable consideration, it is difficult to see why the doctrine of estoppel ought not to prevent him from asserting the falsity of the representations by which he accomplished that purpose.

But whether this be so or not, we think the case was clearly one in which, upon the facts before the court, the plaintiffs were entitled to recover the amount of his account for goods sold and delivered. They had set out the indebtedness upon the account in their complaint, and the fact in respect of the giving of the note for that indebtedness, and the non-payment of the note at its maturity; and they demanded judgment for a sum about the same as the amount stated in the complaint. And the respondent, in making his alleged defense, established the fact that such an account actually existed and was owing, and that the note was delivered and applied upon the account, and other facts upon which the court held that the note was usurious and void. There was enough, therefore, before the

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court, assuming that the rulings were right in the exclusion of the estoppel, to have justified and required the court to direct a verdict for the amount of the account. We think the cases go fully far enough to uphold such a ruling; and as the action had become one solely between the plaintiffs and this defendant, who was the original debtor, by the severance, there was no difficulty, in our judgment, if an amendment of the complaint were deemed necessary, to have directed it upon the spot, so that the plaintiffs could recover upon the averments and the proofs, what they clearly were entitled to receive from the defendant, to wit, the amount of their account.

The cases on this subject are numerous, and would, in our judgment, have upheld such a ruling upon the part of the court (*Farm. & Mech. Bank* agt. *Joslyn*, 37 *N. Y. R.*, 353; *Gerwig* agt. *Sitterly*, 56 *id.*, 214; *Jagger Ins. Co.* agt. *Walker*, 76 *id.*, 521; *Patterson* agt. *Birdsall*, 64 *id.*, 294; *Cook* agt. *Barnes*, 36 *id.*, 520; *Winsted* agt. *Webb*, 39 *id.*, 325; *Hill* agt. *Beebe*, 13 *id.*, 556; *Conlan* agt. *Wood*, 6 *Weekly Dig.*, 379; *Rice* agt. *Welling*, 5 *Wend.*, 595, 597).

The judgment must be reversed and a new trial ordered, with costs to abide the event.

SUPREME COURT.

JOHN ROACH, JORDON L. MOTT and GARRET ROACH agt. ISAAC
F. DUCKWORTH.

Creditor's action against trustee of manufacturing corporation.

A loan of \$6,000 was made by A. to B., for the benefit of a manufacturing corporation of which B. was trustee, he giving as collateral security \$6,000 of the corporation's bonds, of which he was the owner. On non-payment of the indebtedness, A. caused the bonds to be sold at public auction and to be bid in for his benefit by C., a clerk in the office of his attorneys, for a nominal sum for which C. gave his note, which was paid with funds furnished him for the purpose. A judgment subsequently

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recovered by C. against D. in this court for the amount of the bonds, for D.'s default as trustee of the corporation in filing annual reports, was satisfied upon payment by D. of \$1,300. A., who received no part of this money, moved to set aside the satisfaction (which was made without his knowledge) as in fraud of his rights, his attorneys joining in the motion, alleging a lien upon the judgment for professional services, of which lien C. was cognizant. The court refused to interfere. A., in a suit in his own name in the common pleas against D. and other of the trustees, to recover for the same defaults set forth in B.'s action against D., obtained judgment for the \$6,000 loaned by him to the corporation. D. and his cotrustees becoming aware long after both judgments were obtained that A. had sued in B.'s name and that both claims in fact belonged to A., sought to vacate the common pleas judgment, but the application was refused, "without prejudice to any motion for any other relief." They then brought this action against A. to enjoin the enforcement of said judgment:

- Held*, 1. That this action is within the terms of the favor granted the moving party upon denial of the application to vacate the common pleas judgment:
2. Though in fact the corporation was indebted in \$12,000 on the bonds and money loaned, yet, as the bonds belonged to B., a trustee, he could not maintain an action against cotrustees for defaults in filing annual reports in which he had participated; and A., after selling the bonds held by him as security for a debt, could not recover in a suit for his benefit on the bonds, and on the debt besides.
 3. Such recovery for the advantage, in part, of B., could not be permitted, as it would be allowing by indirection what could not be done directly.
 4. That A. and his attorneys have lost the fruits of the judgment in favor of B., results from the unusual way in which they elected to proceed.

Special Term, April, 1881.

George W. Van Sickler, for plaintiffs.

Hatch & Van Allen, for defendant.

VAN VORST, J. — The claim of the defendant Duckworth against the Ætna Iron Works for moneys loaned was the sum of \$6,000. A question arises under the evidence as to whether the money was not loaned in reality to Birdsall Cornell, one of the trustees and the president of the company, personally.

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But if Cornell borrowed the money, he did so for the company, which in the end received the same. There is enough to justify the conclusion that the company was a debtor to the defendant for the amount.

As collateral security for the repayment of this loan Cornell delivered to Duckworth, subsequently, bonds of the corporation, of which he was the owner, to the amount of \$6,000. These were corporate obligations.

As Cornell had been the instrument through which this money had been borrowed he may have supposed that he was in some way bound to secure Duckworth the return of this money, and therefore pledged his own securities for such purpose.

The indebtedness of \$6,000 was not paid, and the defendant caused the bonds made by the corporation, and which he held as collateral security, to be sold at public auction. Although he went through the form of a sale, no actual and intentional disposal of the bonds was made.

The bonds were struck off at the sale to one Croker, who was a clerk in the law office of the attorneys for the defendant, for the nominal sum of \$640. For this sum Croker gave his note, which was afterwards paid, or pretended to be, with funds furnished to Croker for the purpose. The purchase was made in the interest of and for the defendant, the seller of the bonds. An action was afterwards commenced in this court in the name of Croker by the attorneys of the defendant against John Roach, one of the plaintiffs in this action, and who was a trustee of the corporation, to recover from him the amount of these bonds, as an obligation of the corporation, upon the ground that the trustees had failed to file the annual reports called for by the statute in respect to manufacturing corporations, and a judgment was recovered against John Roach for the amount of the bonds. Croker afterwards, upon receiving from Roach, or his attorney, the sum of \$1,300, satisfied that judgment, and it was discharged of record.

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This satisfaction of the judgment was made by Croker without the knowledge of Duckworth, who received no part of the moneys which were paid to Croker upon the satisfaction.

The defendant Duckworth afterward, and upon the ground that he was the real owner of the judgment and the party in interest, and that the satisfaction was in fraud of his rights, moved to set aside the satisfaction and to restore the judgment. In this motion his attorneys joined, for the reason, as they allege, that they had a lien upon the judgment to the amount of \$2,000 in pursuance of an arrangement between themselves and Duckworth, of which Croker was cognizant. This lien was for professional services. The motion was denied, and the order of denial was affirmed on appeal. The court, according to the opinion delivered at General Term, "did not feel called upon by any rule of law or equity to interfere on behalf either of Duckworth or of his attorneys."

"The whole scheme," as the opinion of the General Term states, "as arranged between them and Croker, was obviously to collect a double penalty of the defendant Roach for a single indebtedness," and properly failed.

The real claim in favor of Duckworth was that for the sum of \$6,000, loaned by him to the corporation, for which he held the bonds as collateral security. Upon that demand of \$6,000 he commenced an action in the court of common pleas in his own name against John Roach and other of the trustees, to recover for a default in filing annual reports in the years 1874 and 1875, being the same defaults mentioned in the complaint in the action in this court in the case of *Croker agt. Roach*. In that action, in the court of common pleas, Duckworth recovered a judgment against John Roach and other trustees for the amount of that indebtedness. The fact that Duckworth sued in Croker's name, and that both claims in fact belonged to Duckworth, were unknown to John Roach and his cotrustees until long after both judgments were obtained.

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Under the circumstances of the case, the judgment in this court in favor of Croker, the nominal plaintiff, against Roach, could have been plead in bar to the action in the court of common pleas had all the facts been known in season. The general term of this court has so held. After the satisfaction of the judgment in this court an application was made by Roach in the court of common pleas to vacate the judgment recovered in favor of Duckworth against Roach and others; but that motion was denied, and the denial was affirmed on appeal. But at the general term of the court of common pleas the denial was made "without prejudice to any motion for any other relief."

What is asked in substance in this present action is an order of injunction perpetually restraining the collection of the judgment in favor of *Duckworth agt. Roach and others*. It is claimed by the learned counsel for the defendant that the order of the court of common pleas is an answer to this suit. I do not think so. I think that this action is within the terms of the favor granted to the moving party upon the affirmance of the order denying the motion to set aside the judgment.

It is true that this is an action and not a motion, but I have no idea that the court of common pleas intended to limit the moving party to the mere form in which he would ask for relief if he was entitled to any.

It is, however, argued upon the merits, that the company was in fact indebted in the sum of \$12,000, that the bonds for \$6,000 represented a claim against the corporation for their face, and that Duckworth had a distinct claim for \$6,000, money loaned.

But the bonds in fact belonged to Birdsall Cornell, a trustee; he pledged them to Duckworth as collateral to the loan made by Duckworth for \$6,000.

Birdsall Cornell could not in his own name have prosecuted his cotrustees for a default in filing annual reports in which he had himself participated. The action is penal in its nature.

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And the fact that Duckworth purchased at the auction sale the bonds held by him as security for a debt in the name of another, but for his own benefit, will not enable him to recover on the bonds and on his debt in addition. This would enable him to recover \$12,000 when but \$6,000 were due him.

Nor could he equitably prosecute both the bonds and his original indebtedness for the advantage in part of Birdsall Cornell. For should he recover both amounts he must in the end account to Birdsall Cornell for all excess over \$6,000. This would be allowing by indirection what could not be directly done, for the reasons above stated.

There can only be one satisfaction of the claim against Duckworth against the trustees for the defaults in 1874 and 1875, and that was had when the judgment in favor of Croker was canceled.

That Duckworth and his attorneys have lost the fruits of that judgment results from the unusual way in which they elected to proceed.

Equity demands that Roach should not be doubly vexed for the same default, and that Duckworth should not recover twice the sum of his demand against the corporation from Roach and his associate trustees, either for his own advantage or that of Birdsall Cornell, a cotrustee with Roach. The *bona fides* of the settlement between Roach and Croker was definitely decided, upon the motion to set aside the satisfaction of the judgment, and no fact appears here which was not adduced on the hearing of that motion.

The result reached is that the defendant should be enjoined from collecting or attempting to enforce his judgment which is still outstanding, described in the complaint herein, and the judgments of affirmance thereof, and the plaintiff should recover the costs of this action.

Pierson agt. McCurdy.

SUPREME COURT.

HENRY R. PIERSON, receiver, agt. RICHARD A. MCCURDY.

Complaint — Demurrer — Complaint by a receiver of a company against a trustee of another company to recover for moneys illegally obtained — Sufficiency of — Demurrer to not sustained — Parties.

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, cannot prevail, unless it is apparent from an examination of the complaint, taking all its allegations to be true, that no cause of action whatever is stated.

The fact that the plaintiff may, in his complaint, have demanded relief to which he is not entitled, or may have misconceived the nature of the judgment which the court should pronounce upon the facts set forth in the complaint, does not make the complaint bad upon demurrer, if those facts entitle him to any judgment or any relief.

The complaint alleges that defendant, knowing that the stock of the Widows and Orphans' Company, in which he was a trustee, was greatly impaired and depreciated in value, became a party to a transaction by which he knowingly and illegally received the trust funds of the Mutual Protection Company in payment for the former company's stock, and that, with such knowledge, he disbursed the money thus received to himself and others in payment for such stock; that he also received \$25,000 for his services in acting in the capacity of stakeholder of the moneys and stock pending the consummation of the agreement between the parties, and also paid to the president of the Widows and Orphans' Company, \$10,000, in pursuance of the agreement alleged in the complaint:

Held (overruling demurrer to complaint as not stating facts sufficient to constitute a cause of action), that the complaint states facts sufficient to show a fraudulent conspiracy on the part of defendant, with others, to illegally obtain the trust moneys of the Mutual Protection Company; defendant being bound to know that that company was prohibited from investing its funds in stock below par, and the extravagant price paid for the stock in itself raising the presumption of fraud.

There is no defect of parties defendant, though others alleged to have been engaged in the scheme are not joined, because these parties were joint tort feasers with defendant, and severally as well as jointly liable to plaintiff; and it is, therefore, at his option to sue any one or all; and the fact that equitable relief is demanded does not affect the question as to parties.

Special Term, June, 1881.

Pierson agt. McCurdy.

John E. Develin, for defendant in support of the demurrer.

William C. Trull, for the plaintiff, opposed.

LAWRENCE, J.—I am of the opinion that the demurrer interposed by the defendant cannot be sustained. The demurrer is upon three grounds: First. That there is a defect of parties defendant. Second. That two causes of action have been improperly united, to wit, a cause of action as for a conspiracy by the defendant, and a cause of action on contract by the defendant to account as trustee. Third. That the complaint does not state facts sufficient to constitute a cause of action.

As to the last ground of demurrer, the defendant cannot prevail, unless it is apparent from an examination of the complaint, taking all its allegations to be true, that no cause of action whatever is stated. And the fact that the plaintiff may in his complaint have demanded relief to which he is not entitled, or may have misconceived the nature of the judgment which the court should pronounce upon the facts set forth in his complaint, does not make the complaint bad upon demurrer, if those facts entitle him to any judgment or any relief. This has been so often held that it seems hardly necessary to cite authorities, but the following cases are referred to as conclusively sustaining the proposition (*Hall* agt. *Omaha National Bank*, 49 *N. Y.*, 629; *Emery* agt. *Pease*, 20 *N. Y.*, 64; *Johnson* agt. *Kelly*, 2 *Hun*, 139; *Mackey* agt. *Auer*, 8 *Hun*, 181, 183, 184).

Without reciting in detail the allegations in the complaint in his case, I deem it sufficient to say that it appears to me that enough facts are stated to show that the plaintiff is entitled to some relief against the defendant. It is alleged in substance that, knowing that the stock of the company in which he was a trustee was greatly impaired and depreciated in value, he became a party to a transaction by which he knowingly and illegally received the trust funds of the Mutual

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Protection Company in payment for that stock, and that with such knowledge he disbursed the money thus received to himself and others in payment for such stock. That he also received \$25,000 for his services in acting in the capacity of stakeholder of the moneys and stock pending the consummation of the agreement between the parties, and also paid to the president of the Widows and Orphans' Company \$10,000, in pursuance of the agreement alleged in the complaint. In other words, the facts stated in the complaint, in my opinion, show a fraudulent conspiracy or scheme on the part of the defendant and the others referred to in the complaint to obtain the trust moneys of the Mutual Protection Company by means of a sale to the latter which he knew to be illegal (*See Laws of 1868, chap. 318, sec. 1; Pratt agt. Short, 79 N. Y., 442*).

He was bound to know under the law of the state that the Mutual Protective Company was prohibited from investing its funds in the stock of the Widows and Orphans' Company, the market value of that stock being far below par. And I agree with the counsel for the plaintiff that the extravagant price paid for the stock, independently of all other considerations, raises a presumption of fraud which would be alone sufficient to sustain the complaint (*See Boynton agt. Andrews, 63 N. Y., 93*).

It follows, therefore, that the demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action must be overruled.

Is there a defect of parties defendant for the reason that the others who are alleged to have been engaged in a scheme in pursuance of which the defendant received and disbursed the moneys mentioned in the complaint are not made parties defendant in this action? I think not. If my theory of the complaint is sound, the parties who joined with the defendant in the alleged fraud were joint *tortfeasors* with the defendant, and severally as well as jointly liable to the plaintiff as the receiver of the Mutual Protection Company, and it is at the option of the plaintiff to sue any one, all, or such number of

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the *tort feasons* as he may choose (*Roberts agt. Johnson*, 58 *N. Y.*, 616, *per GROVER, J.*; *Creed agt. Hartman*, 29 *N. Y.*, 591, 597; *Low agt. Mumford*, 14 *Johns.*, 426).

Nor does the fact that equitable relief is demanded by the plaintiff affect the question as to parties. As already stated, the nature of the relief demanded does not affect the plaintiff's right to maintain this action, if in any conceivable point of view a cause of action against the defendant is disclosed by the facts set forth in the complaint. Besides, the rule in this respect as to wrongdoers is the same in equity as at law (*See Miller agt. Fenton*, 11 *Paige*, 20; *Attorney-General agt. The Corporation of Leeds*, 4 *London Jurist*, 1174; *Cunningham, agt. Bell*, 5 *Paige*, 612, and cases cited).

The objection that two causes of action have been improperly united I do not regard as well founded. But one cause of action is stated in the complaint, to wit, the alleged acts or scheme to which the defendant was a party, and by means of which he knowingly and illegally became possessed of the trust property of the Mutual Protection Company. The moneys came to him impressed with the trust for which they had been set apart, and he is sought to be held liable for his illegal diversion of them from the purposes of that trust, and for his unlawful appropriation of them to his own use and to the use of others.

The demurrer to the complaint is overruled and leave given to the defendant to answer over upon payment of costs.

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SUPREME COURT.

THE PEOPLE *ex rel.*, &c., HENRY C. ADAMS agt. ZERAH S. WESTBROOK, surrogate of Montgomery county, and JACOB C. NELLIS, executor, &c., of PETER G. FOX, deceased.

Surrogate — Jurisdiction — Contested claims against estate — Proceedings to sell the lands of a decedent to pay the debts and claims against him, and to make distribution — Jurisdiction of surrogate to hear and determine — Writ of prohibition — Code of Civil Procedure, secs. 2755, 2756, 2758, 2761, 2788.

In proceedings to sell the lands of a decedent to pay the debts and claims against the decedent, and to make distribution among the creditors, the surrogate has jurisdiction to hear proofs and decide upon a claim disputed by the executor.

The surrogate has not jurisdiction to decide the question between a creditor of the deceased on the one side and the representative of the deceased upon the other.

It is entirely plain from the provisions of the Code of Civil Procedure (see sections 2755, 2756, 2758, 2761, 2788) upon this subject that the surrogate is the proper if not the ultimate tribunal for the determination of the claims of creditors, whether disputed or not, upon the real estate of the decedent sold under the order of the surrogate for the payment of debts and its proceeds.

Quere, whether the surrogate should not delay the hearing upon relator's claims and the making of distribution until the relator's action, pending in the supreme court, to make the decedent personally liable or his estate chargeable for misappropriating funds equitably belonging to the relator.

•Washington Special Term, April, 1881.

Henry C. Adams, relator in person.

J. E. Dewey, for respondents.

POTTER, *J.* — This matter is presented upon an alternative writ of prohibition, and the return thereto with an order to show cause why the respondent, the surrogate of the county of Montgomery, should not be restrained and absolutely pro-

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hibited from proceeding to hear the proofs and allegations of the creditors generally, and especially of the claim and demand of the relator against the estate of Peter G. Fox, deceased.

It is quite unnecessary to state the history and proceedings in the various actions which have resulted in the claim which the relator has or claims to have against the estate of said Fox.

Such statement would serve no useful purpose in disposing of the question now presented.

It is sufficient to state in a general way that the decedent Fox was the executor of an estate, and through proceedings taken by him as such executor to raise the money necessary to pay off the claims of creditors of the estate of which he was such executor, and especially certain judgments against said estate of which the relator was the equitable assignee, or upon which he had a lien, moneys were raised upon a mortgage and went into the hands of said Fox as such executor, and that said Fox violated his duty and the rights of said relator by paying said moneys to another and not to the relator, to whom they equitably belonged, and that for that cause the relator brought an action against said Fox, charging said Fox personally with a liability for so doing.

A judgment was obtained in that action, but for some informalities or irregularities it was set aside and the action is still pending.

Before such judgment was entered, Fox, the defendant in said action, died, and the respondent Nellis has been appointed the executor of said Fox, deceased, and has been substituted in place of said Fox, deceased, as the defendant in said action.

Since the appointment of said Nellis as executor of said Fox, the real estate of said Fox has been sold for the purpose of paying the claims and demands against the estate of said Fox, and the proceeds of such sale are now in the hands of said respondent Westbrook, as surrogate, awaiting distribution under an order for that purpose.

The object of this motion is to restrain and prohibit the surrogate from proceeding to take proofs of claims and to

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make distribution among those who have or shall establish their claims against the estate of said Fox.

The grounds upon which the relator bases his right to this writ are, that these moneys are trust funds and primarily applicable to the payment of the relator's claim, and that the relator's claim is disputed by the executor, and that the surrogate has no power or jurisdiction to hear and decide upon a disputed claim.

In regard to the first ground it is not perceived how the lands of the decedent Fox, and which have been sold under the order of the surrogate to pay all the claims against the estate of said Fox, or the proceeds of the sale of them, became impressed with a trust character or quality for the payment of the relator's claim especially or differently from the other claims against the estate of said Fox.

If such a character ever attached to the estate or the funds once in course of administration by said Fox as executor, and which he is charged with having ignored or disregarded in the relator's action against him, that character would not attach to the property which said decedent owned individually.

But if it were so, and the surrogate had jurisdiction to entertain and decide upon the relator's claim, the surrogate could determine whether the moneys now in his hands were impressed with a trust quality in respect of the relator's claim, and give it such preference as it is entitled to in the order of distribution.

That brings us to the consideration of the real, and as I apprehend, the only question upon the motion, viz. : Has the surrogate jurisdiction in proceedings to sell the lands of a decedent to pay the debts and claims against the decedent, and to make distribution among the creditors, to hear proofs and decide upon a claim disputed by the executor ?

I will not stop to consider whether the executor has or will, or ought to dispute the relator's claim. Nor whether the surrogate will not or should not delay the hearing upon relator's claims, and the making of distribution until the relator's

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action pending in the supreme court to make the decedent Fox personally liable or his estate chargeable for misappropriating funds equitably belonging to the relator.

It has been held by the general term of the supreme court in this district that the surrogate in proceedings under the statute to lease, mortgage or sell real estate to pay debts of decedent's, has jurisdiction of disputed claims, and to determine, to allow or reject such claims (*Hopkins agt. Van Valkenburgh*, 16 *Hun*, 3).

The court while holding in that way, in these proceedings, concede the well-established rule that the surrogate has not jurisdiction to decide the question between a creditor of the deceased on the one side and the representative of the deceased upon the other.

The case of *Tucker agt. Tucker* (4 *Keyes*), which is sometimes cited to support a different rule, was not overlooked by the court in the case of *Hopkins agt. Van Valkenburgh*.

It was not entirely certain upon what ground the court or the judges, other than the judge who wrote the opinion, placed their decisions in the case of *Tucker agt. Tucker*.

There is this, however, to be remarked in relation to that case, that the cases referred to by the court in *Tucker agt. Tucker*, were cases between creditors upon one side and personal representatives upon the other, and that the references to the statute are to those sections which relate to the rendering of an account by the executor or administrator, and not to those sections of the statute which relate to the powers and duties of the surrogate in proceedings to sell real estate of a decedent and the making of distribution of its proceeds among creditors or claimants.

I think when sections of the Revised Statutes, referred to by the learned judge in *Hopkins agt. Van Valkenburgh*, upon the subject of selling the real estate of a decedent, and the proceedings before the surrogate for that purpose are considered, there can be no doubt of the power of the surrogate to hear and decide upon a disputed claim.

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And such is manifest by the scheme and design of the provisions of the Code of Civil Procedure upon that subject (*See secs. 2755, 2756, 2758, 2761, 2788*).

It is provided by section 2756 that a judgment or decree obtained against the executor is only presumptive evidence of the debt or claim, but the same is to be established in the same manner and to be subject to the same defense as if an action had not been brought thereon.

And by section 2757 the claim, though in a judgment, is only to be allowed for the amount of the debt, and not for the costs contained in the judgment, and the judgment itself is liable to be reduced in favor of heirs, devisees or their assigns, by the amount of any counter-claim which he may have against the debt in judgment.

It is entirely plain from these and other provisions of the Code of Civil Procedure upon this subject, that the surrogate is the proper, if not the ultimate tribunal, for the determination of the claims of creditors, whether disputed or not, upon the real estate of the decedent, sold under the order of the surrogate for the payment of debts and its proceeds.

With these views the motion for an absolute prohibition must be denied, and fifty dollars costs and disbursements should be awarded to the respondents or their counsel.

N. Y. MARINE COURT.

AGNES REIMER agt. GUSTAVE A. DOERGE *et al.*

Pleading — Practice — Effect of plea of payment of cause of action after suit brought, but before answer.

A defendant may set up in his answer any matter arising before it is put in, whether it occurred after suit brought or not.

Although not a plea in bar, it is an answer to the further maintenance of the suit, and, if true and sufficient, is equally effective in preventing a recovery.

In an action brought against the defendants as sureties upon an undertak-

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ing on appeal, the appeal being dismissed on May 2, 1881, and by such dismissal the liability of the sureties became fixed and on the same day an execution upon the judgment was issued, which the defendant satisfied by paying the same to the sheriff on May 18, 1881. The action was commenced four days prior to such payment, and defendant pleaded as a defense the payment of the judgment debt to the sheriff:

Held, that the plaintiff having elected to try the issue and upon the trial the plea of payment as pleaded being fully proved, there must be judgment for the defendants, with costs.

Trial Term, June, 1881.

THIS action was brought against the defendants as sureties upon an undertaking on appeal from the special to the general term of the court of common pleas. The appeal was dismissed on the 2d of May, 1881, and according to the terms of the undertaking the liability of the sureties became fixed. On the same day an execution upon the judgment was issued, which the defendant therein satisfied by paying the same to the sheriff on the 18th of May, 1881. Four days prior to such payment this action was commenced, and the defendant pleaded as a defense the payment of the judgment debt to the sheriff. This is the issue presented for trial.

J. P. Schuchman, for plaintiff.

Henry Wehle, for defendants.

McADAM, *J.*— There are authorities holding that a defendant may set up in his answer any matter arising before it is put in, whether it occurred after suit brought or not (*Willis* agt. *Clipp*, 9 *How. Pr.*, 568; *Carpenter* agt. *Bell*, 19 *Abb. Pr.*, 263; *Bennett* agt. *Annesly*, 27 *How. Pr.*, 184; *Beebe* agt. *Dowd*, 22 *Barb.*, 255). That although not a plea in bar, it is an answer to the further maintenance of the suit, and, if true and sufficient, is equally effective in preventing a recovery (*Carpenter* agt. *Bell*, *supra*). The plaintiff cannot now object to the regularity of the plea, after having accepted it by going

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to trial upon the issue presented by it. If it was irregular for any reason, the remedy against it was one of practice to be determined upon motion before the trial. The plaintiff elected to try the issue, and upon the trial the plea of payment as pleaded was fully proved. It follows, therefore, that there must be judgment for the defendants, with costs.

SUPREME COURT.

MATHEW J. STEEN agt. NIAGARA FIRE INSURANCE COMPANY.

Insurance, fire—Limitation of action by clause in policy—When policy not void by non-occupancy of building—When not void by reason of clause as to liens.

Where the policy of fire insurance contained the following clause: "No suit or action of any kind against this company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months *next after the loss or damage shall occur.*" By the terms of the policy, proofs of loss were to be furnished in sixty days from the happening thereof. The fire occurred January 11, 1876, and the suit was not commenced till March 3, 1877:

Held, that a recovery is not barred by the clause in the policy. The words "after the loss shall occur," refer to the time when the loss shall become a fixed demand, and not to the time of the actual destruction. Limitations of action never commence until the cause of action accrues.

The policy contains a clause which declares, after the enumeration of several other matters: "or if the premises, at the time of insuring, or during the life of this policy, vacant, unoccupied, or not in use, whether by the removal of the owner or occupant, or for any cause, without this company's consent is indorsed hereon, this insurance shall be void, and of no effect." On the application of the insured, the general agents of the defendant wrote in the body of the policy, so as to make a part and portion of the contract, this clause: "The dwelling being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to this policy:

Held, that the clear effect of the insertion of such a clause in the body of the policy was to modify the contract as originally made; and the one making it void for non-occupancy must be read in connection with the

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amendment, and so reading it the policy is not vitiated; for the premises were only temporarily vacant at the time of the fire, and were then "in charge of a trusty person living near by."

Held, further, that a declaration of the defendant, by its general agents, when informed of the last vacation of the premises, that the contingency was provided for, would waive the forfeiture, if any existed.

Where the policy contained a clause as to liens, as follows: "In case of assignment, before or after loss, whether of the whole policy or of any interest in it, or of any sale, transfer or change of title in the property insured by this company, or of any undivided interest therein, or the entry of a foreclosure of a mortgage, or the creation of any lien, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease." Various judgments were recovered against A., to whom the policy was issued, and under one the premises on which the insured dwelling was located was sold by the sheriff to S., the plaintiff. Four days after such purchase the defendant, by its general agent, and by an indorsement made upon the policy, consented to the assignment thereof by A. to S.:

Held, that the consent to a transfer was a renewal of the policy, if it had become void by the sale or recovery of the judgments.

Held, further, that the recovery of the judgments against A. did not vitiate the policy. He did not, by his own voluntary act, incumber the property, and he must have created the liens to make the policy void.

Ulster Circuit, January, 1879.

Schoonmaker & Linson, for plaintiff.

J. E. Dewey, for defendant.

WESTBROOK, J. — This suit was brought upon a fire insurance policy. Without any detailed statement of facts we proceed at once very briefly to discuss the points made.

First. Is a recovery barred by the clause in the policy, which reads: "No suit or action of any kind against this company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within

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the term of twelve months *next after the loss or damage shall occur?*"

The suit was not commenced within a year from the time of the destruction by fire, which was January 11, 1876, but within fourteen months of that time, to wit, on March 3, 1877. By the terms of the policy proofs of loss were to be furnished in sixty days from the happening thereof.

If this question was a new one, I must confess my impressions would be in favor of the defendant, for it seems reasonably clear that the agreement of the parties requires the action to be brought within twelve months from the time of the destruction of the property by the fire, for then the "loss or damage" must "occur." I have not felt myself at liberty, however, to examine or reason upon this point, for the court of appeals in *Hay agt. The Star Fire Insurance Company* (19 *Albany Law Journal*, 477, 478) have expressly decided that, "the words 'after the loss shall occur,' refer to the time when the loss shall become a fixed demand, and not to the time of the actual destruction." It is true that in the case referred to, there were facts which would prolong the time for bringing the action, but the court lay down the general principle that, "limitations of actions never commence until the cause of action accrues," and cite *Mayor agt. Hamilton Fire Insurance Company* (39 *N. Y.*, 46), the language in which policy was "six months after any loss or damage shall accrue," as decisive. Indeed, it would be difficult to distinguish between the two expressions. Loss or damage by fire *accrues* or *occurs* when the property is destroyed, and in common parlance the loss is spoken of as then *accruing* or *occurring*; either word would be understood to impart the same meaning. The courts have never doubted the literal meaning of either expression, but have declared when either is used in the policy, it should not be taken literally, but that it should be understood to mean "the time when the loss has become a fixed demand, and not the time of the actual destruction."

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Second. Did the policy become void by reason of the non-occupancy of the building at the time of the fire?

The policy contains a clause which declares, after the enumeration of several other matters, "or, if the premises are, at the time of insuring *or during* the life of this policy, vacant, unoccupied or not in use, whether by the removal of the owner or occupant, or for any cause, *without this company's consent is indorsed hereon*, this insurance shall be void and of no effect."

On the 7th day of January, 1875, on the application of the insured, the general agents of the defendant, E. Vail & Son of Poughkeepsie, N. Y., wrote in the body of the policy, so as to make a part and portion of the contract, this clause: "The dwelling being unoccupied for a short time, but being in the charge of a trusty person living near by, shall be no prejudice to this policy. 7th January, 1875. E. Vail & Son."

The clear effect of the insertion of such a clause in the body of the policy was to modify the contract as originally made; and the one making it void for non-occupancy must be read in connection with the amendment, and so reading it, the policy is not vitiated; for the premises were only temporarily vacant at the time of the fire, and were then "in charge of a trusty person living near by."

In addition to this modification of the policy, for the place of the insertion of the clause shows that it was more than a consent to *one* temporary want of occupancy, the defendants, by its general agents, when informed of the last vacation of the premises, declared that the contingency was provided for. This would waive the forfeiture if any existed (*Adams agt. Greenwich Fire Insurance Company*, 9 Hun, 47; *same case in Court of Appeals*, 70 N. Y., 166).

Third. Is the policy void by reason of the clause as to liens? That paragraph declares: "In case of assignment before or after a loss, whether of the whole policy or of any interest in it, or of any sale, transfer or change of title in the property insured by this company, or of any undivided inter-

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est therein, or the entry of a foreclosure of a mortgage, or the creation of any lien, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease."

The party to whom the policy issued was Jonas F. Atkins. Various judgments were recovered against him, and, under one rendered in favor of Robert E. Taylor as assignee in bankruptcy of David L. Atkins, on the 12th day of November, 1875, the premises on which the insured dwelling was located were sold by the sheriff of Ulster county to the plaintiff, Matthew J. Steen.

Four days after such purchase, the defendant, by its general agent and by an indorsement made upon the policy, consented to the assignment thereof by Atkins to the purchaser Steen, and on the same day Atkins did assign to him, the plaintiff. That consent to a transfer was a renewal of the policy if it had become void by the sale or the recovery of the judgments. It is true, it was to be an assignment of the policy subject "to all the terms and conditions therein mentioned and referred to;" but if the alleged forfeiture was to be insisted upon, and not waived, what was there to assign? Something, and not nothing, was to be transferred. This seems to be too plain for argument, and the point is sustained by *Shearman* agt. *The Niagara Fire Insurance Company* (46 N. Y., 526), and *Hooper* agt. *Hudson River Fire Insurance Company* (17 N. Y., 424); *Wolfe* agt. *Security Insurance Company* (39 N. Y., 49); *Carroll* agt. *Charter Oak Insurance Company* (38 Barb., 412).

The recovery of the judgments against Atkins did not vitiate the policy. He did not, by his own voluntary act, incumber the property, and he must have created the liens to make the policy void (*Bailey* agt. *Homestead Fire Insurance Company*, 21 *Albany Law Journal*, 173).

It will be borne in mind also, that after all the acts of Atkins had occurred which are claimed to vitiate the policy,

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the company consented to an absolute transfer thereof to the plaintiff. This act makes it a valid policy in his hands.

The result of my examination is, that plaintiff is entitled to judgment.

COURT OF APPEALS.

HORACE INGERSOLL, appellant, agt. JOHN W. MANGAM *et al.*,
respondents.

Non-resident infants — actions against, how commenced — Code of Civil Procedure, sections 416, 424, 426, 471 — Guardians, how appointed.

In all actions except partition summons must be served upon non-resident infant defendants by publication.

A guardian can only be regularly appointed for an infant defendant after service of the summons personally, or by the substituted mode as prescribed.

March, 1881.

THIS was an action of foreclosure. The infant appeared by McGuire & Kuhn, attorneys, and also by Simon Dunne, as guardian *ad litem*. The court, at special term (GILBERT, J.), directed the purchaser to take title. The general term (BARNARD and DYKMAN, JJ.), on appeal by purchaser, reversed the order of the special term, and plaintiff appealed to the court of appeals.

John Bradner Perry, for appellant.

S. M. & D. E. Meeker, for respondents.

ANDREWS, J. — The purchaser objected to the title on the ground that the summons was not served on the infant, William Mangam. The action was for the foreclosure of a mortgage executed by the father of the infant, who died prior to the commencement of the action. The infant is under

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fourteen years of age, and had an interest in the mortgaged premises by descent, as heir of his father, and resided, when the action was commenced, with his mother in New Jersey. The summons was personally served on the mother in this State, and after such service, on her application, Simon Dunne, a counselor-at-law of the city of Brooklyn, was by an order of the court appointed guardian *ad litem* of the infant defendant, and appeared and put in a general answer as such guardian. The summons was not served on the infant, either personally or by publication, and if such service was necessary to give the court jurisdiction to render judgment foreclosing and barring the infant's interest in the premises, the title is defective and the purchaser should not be compelled to complete his purchase.

The Code enacts that a civil action is commenced by the service of a summons (*Sec. 416*). Where the defendant is an infant under fourteen years of age, it is declared that personal service must be made by delivering a copy of the summons within this State to the infant, and also to his father, mother or guardian, or if there is none within the State, to a person having the care or control of him, or with whom he resides, or in whose service he is employed (*Sec. 426*.)

Service on the infant alone, or on the father, mother, guardian or other person mentioned alone, does not constitute a personal service within the statute. Service on both must concur to answer its requirement. There was, therefore, no personal service of the summons in this case, and there was no attempt to serve by publication.

The Code also provides that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him (*Sec. 424*). It is claimed that the appearance by the guardian *ad litem* was a voluntary appearance by the infant within this section. An infant must appear by guardian (*sec. 471*); but a guardian can only be regularly appointed for an infant defendant after service of the summons personally or by the substituted mode (in certain speci-

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fied cases) prescribed. This is clearly implied by the language of the section last cited. It provides that the guardian is to be appointed upon the application of the infant, if he is of the age of fourteen years and upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, if made in the other mode prescribed; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. The application in both cases is to be made after the personal or substituted service has been made and completed.

The order for the appointment of the guardian *ad litem* in this case authorized the guardian appointed to appear and defend the action in behalf of the infant; but the difficulty is that the order was unauthorized, because the court had no jurisdiction over the infant or to appoint a guardian *ad litem* when this order was made, by reason of the fact that the infant had not been brought in, and the action had not been commenced against him by the service of the summons, which is the statutory mode by which the court acquires jurisdiction of the person or property of an infant. The appearance by the guardian was not, therefore, an appearance by the infant, and was not within section 424. The infant was incapable of consenting to such appearance, and the guardian could not consent to the exercise of jurisdiction over him by an appearance not preceded by the service of process.

The question in this case was raised in *Bosworth* agt. *Vandewalker* (53 N. Y., 597), but was not decided, the court in that case holding that it did not appear that the infants had not been served, and in the absence of such proof, that it would be presumed that the court which rendered the judgment had jurisdiction. It was held by the chancellor, in *Grant* agt. *Van Schoonhoven* (9 Paige, 255), that to authorize the appointment of a guardian *ad litem* of infant defendants under the one hundred and forty-sixth rule in chancery, the petition must distinctly show that the infant had been

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served with process, or that he had been proceeded against as an absentee, and an order obtained for his appearance, under the statute. Infants are deemed to be wards of the court, and when brought in by service of process, the court will look after and protect their interests. But the court must first acquire jurisdiction before they are bound by its judgment.

There is no invariable rule defining what legal proceedings constitute due process of law conferring jurisdiction to deal with and bind the property of infants by judicial proceedings. Notice in some form, either actual or constructive, is essential, but the legislature may prescribe that such notice shall be given to the parent or guardian, or other person, as representing the infant, and proceedings in conformity with the statute in such cases will be valid and the infant will be bound.

Under the Revised Statutes, in proceedings for partition of lands by petition, jurisdiction over the person and property of infants was acquired by the appointment of a guardian, in the first instance, upon notice to such infants, or to their general guardian. Service of notice upon the infants was not indispensable to the exercise of the jurisdiction (2 *R. S.*, 317, *sec.* 2; *Croghan agt. Livingston*, 17 *N. Y.*, 218).

The provisions of the Revised Statutes relating to the partition of lands were, by section 448 of the Code of Procedure, made applicable to actions for partition so far as the same could be applied to the substance and subject-matter of the action, without regard to form; and in *Gotendorf agt. Goldschmidt* (*MSS. opin.*, 1880), it was held, that under the provisions of the Revised Statutes and of the Code in force when that action was commenced, personal service of the summons upon an infant defendant, in an action of partition, was not essential to give the court jurisdiction. But this is an action for foreclosure, and is governed by the general rules applicable to other actions.

The legislature has seen fit to prescribe that the summons shall be served on infant defendants. This was the mode

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defined by the statute for acquiring jurisdiction over their persons and property.

It is no answer to the objection that the statute has not been complied with in respect to the mode of service, that the infant is of such tender years that he would have derived no benefit from the service if made; or that it would have been competent for the legislature to have provided that service upon the parent or guardian should stand as service upon the infant. The statute has prescribed how jurisdiction shall be acquired, and courts cannot dispense with its observance.

The order should be affirmed.

All concur, except RAPALLO, J., absent.

SUPREME COURT.

RILEY A. BRICK and another agt. FRANK F. FOWLER.

Referee's fees — stipulation to pay will be enforced.

Where a party at the commencement of a reference stipulates with the opposite party to pay half the referee's fees, such stipulation will be enforced (*Following Fischer agt. Raab et al.*, 56 *How.*, 218-223; and *Bloodgood agt. Bloodgood*, 59 *How.*, 42).

Special Term, March, 1881.

IN June, 1880, a motion was made in this cause for an order substituting other attorneys in the place and stead of Messrs. Holbrook & Smith, attorneys for defendant, and requiring them to deliver to said defendant all papers in their possession belonging to him. On the hearing of said motion it was referred to a referee to take proofs and report the same with his opinion as to what, if anything, was due said Holbrook & Smith for services rendered by them for said defendant. Before proceeding with the reference a stipula-

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tion was entered into between said Holbrook & Smith and the defendant as follows :

"It is hereby stipulated and agreed by and between the parties to this reference, that the statutory fees of the referee is waived, and the referee shall be entitled to charge in lieu thereof three dollars per hour for each and every hour or fractional part of an hour spent in and about the reference, said fees to be paid one-half by each party as demanded."

Said reference was proceeded with from time to time to the sixteenth day of March, when said referee notified the respective parties that his report was ready and would be filed on payment of his fees. The whole amount of referee's fees was the sum of \$228, one-half of which has been paid by Holbrook & Smith as provided for in said stipulation. There was due the referee, on account of defendant Fowler's share of said fees, the sum of sixty-nine dollars. The referee demanded payment of said sum from said defendant by letter to his said attorney, Mr. Easton, on the sixteenth of March, to which no answer was received.

On the 23d day of March, 1881, Messrs. Holbrook & Smith made a motion based on the following affidavits for an order that the defendant Fowler pay to the referee the balance of his fees as per stipulation.

CITY AND COUNTY OF NEW YORK, ss. :

Frank E. Smith, being duly sworn, says that he is a member of the firm of Holbrook & Smith, the attorneys for the defendant in the above entitled action.

That in June, 1880, a motion was made herein for an order substituting other attorneys in their place and stead as attorneys for said defendant, and requiring them to deliver to said defendant all papers in their possession belonging to him. That on the hearing of said motion it was referred to R. M. Stover, Esq., to take proofs and report the same, with his opinion as to what, if anything, is due said Holbrook & Smith for services rendered by them for said defendant, and

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the further hearing of said motion was adjourned until two days after the coming in of said referee's report. That before proceeding with said reference a stipulation was entered into between said Holbrook & Smith and the defendant, a copy of which is annexed to the accompanying affidavit of R. M. Stover. That said stipulation was signed by J. Thain Easton, as attorney for said defendant, in the presence of said defendant and of this deponent and the referee. That before signing the same Mr. Easton asked the defendant if he was willing to pay one-half the fees of the referee at the rate expressed in said stipulation, defendant replied that he was, and Mr. Easton thereupon signed the said stipulation as his attorney.

That said reference was proceeded with from time to time and closed on the 5th of March, 1881. That on the 16th of March, 1881, said referee notified deponent's firm that his report was ready and that he would file the same on payment of his fees.

That deponent's said firm has paid the entire amount due from them to said referee, according to said stipulation, as will more fully appear from the accompanying affidavit of said referee.

That deponent's firm is desirous of having the report of said referee filed, so that the same may be confirmed or such further action had thereon as may be just and proper.

That deponent is informed by said referee that he has twice written Mr. Easton, demanding payment of the balance due him from said defendant, but has received no reply, and that he, the said referee, is desirous of having his fees paid without further delay, for which reason deponent asks that an order to show cause be made returnable in less than eight days.

That no other application has been made for the order now asked for.

CITY AND COUNTY OF NEW YORK, ss.:

R. M. Stover, being duly sworn, says that by an order of this court dated June 28, 1880, made on a motion for sub-

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stituting attorneys for defendant, it was referred to him to take proofs and report the same to this court with his opinion as to what if anything is due to Messrs. Holbrook & Smith, the attorneys for defendant for services rendered by them.

That on the 1st day of July, 1880, before proceeding with said reference, a stipulation, a copy of which is hereto annexed, was entered into between said Holbrook & Smith and J. Thain Easton, as attorney for said defendant on said motion. That said defendant, Frank F. Fowler, was present when said stipulation was signed by his said attorney and then approved of the same.

That under said stipulation there has since been paid to deponent, on account of his fees as such referee on the part of said Fowler, the sum of forty-five dollars.

That said reference was proceeded with before deponent, and closed on the 5th day of March, 1881. That on the 16th day of March, 1881, deponent notified the respective parties that his report was ready and would be filed as soon as the balance due him for fees according to said stipulation was paid.

That the whole amount of deponent's fees, as such referee, is the sum of \$228, one-half of which, being the whole amount due from said Holbrook & Smith, has already been paid deponent by them as provided for in said stipulation.

That there is due deponent from said defendant Fowler, on account of his share of said fees, the sum of sixty-nine dollars.

That deponent demanded payment of said sum from said defendant by letter to his said attorney, Mr. Easton, on the sixteenth day of March last, but that the same has not been paid, nor has any part thereof, nor has any offer or promise been made to pay the same on the part of said Fowler or his said attorney.

On reading the foregoing affidavits the following order was made by LAWRENCE, J.:

On reading the annexed affidavits of R. M. Stover and Frank E. Smith, sworn March 23, 1881, and on motion of Holbrook & Smith,

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Ordered, that said defendant Frank F. Fowler pay to R. M. Stover, the referee herein, on or before the 25th day of March, 1881, the sum of sixty-nine dollars, that being the balance due from said defendant to said referee, on account of his fees as such, or show cause at half-past ten o'clock of that day, at a special term of this court, to be held at chambers at the court house in the city of New York.

NOTE—The fees were paid before the twenty-fifth March, the date mentioned in the order.

SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM M. BARNES agt. JAMES R. ANGEL, Justice, and WILLIAM TAYLOR.

*Summary proceedings—Landlord and tenant—when relation exists—
Assignment of lease.*

Where, in dispossession proceedings, the tenant admitted that he was the tenant in possession of the premises in question, but denied that any attornment had taken place between him and the relator, it appeared that the relator's claim to the possession of the premises rested upon a lease which was assigned by *mesne* conveyance to him, and that the tenant held possession under one of the assignors; but the lease referred to in the assignments was not produced, and the proceedings were dismissed upon the ground that the relation of landlord and tenant did not exist:

Held, that this was error, because the tenant, having hired from one of the assignors of the lease, was precluded from controverting his landlord's title, and the relator, as assignee, succeeded to the rights of the latter.

First Department, General Term, January, 1881.

Before DAVIS, P. J., and BRADY, J.

The People *ex rel.* Barnes agt. Angel.

CERTIORARI to review summary proceedings had before justice ANGEL on the 6th of August, 1880.

Cephas Brainard, for relator.

G. Salmon, for respondent.

BRADY, J.—The relator made application, under the statute in such case provided, for a summons to be directed to William Taylor to show cause why he should not be removed from the premises described in the affidavit upon which the application was founded.

The tenant was duly served with the summons, and on the return day appeared by his counsel, and admitted that he was the tenant in possession of the premises in question, but denied the allegations upon which the summons was issued, and that any attornment had ever taken place between him and the relator.

After the testimony on behalf of the latter had been given, the tenant moved to dismiss the proceedings on the ground that the landlord had not shown proper service of any notice upon him, and for the further reason that there was a variance between the proof and the affidavit upon which the summons was granted, whereupon, as appears by the record, the proceedings were dismissed on the ground that the relation of landlord and tenant did not exist between Wm. M. Barnes and William Taylor; Barnes' remedy being by an action of ejectment.

It appears that the relator's claim to the possession of the premises rested upon a lease or leases made by David Dudley Field, Esq., counselor-at-law, unto one Ann Connell, which appear to have been assigned by *mesne* conveyance to the relator, and that the tenant held possession under one of the assignors, upon the understanding that he was to occupy the premises as long as he wanted them, or until he was given thirty days notice to quit. The lease referred to in the

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assignments, however, was not produced, which may be the reason why the justice dismissed the proceedings, and upon the proposition, doubtless, that the relation of landlord and tenant was not shown to have existed between the parties to this controversy, the chain of title not being perfected by the evidence.

But this was an erroneous view of the subject, because the tenant, having hired from one of the assignors of the lease, was precluded from controverting his landlord's title, and the relator, as assignee, succeeded to all the rights of the latter (*Taylor's Landlord and Tenant* [7th ed.], 705, and cases cited); and, therefore, could maintain this proceeding to recover possession of the premises (1 *R. S.*, 147, 598; *Laws* 1846, chap. 274, sec. 3; *Taylor's Landlord and Tenant* [7th ed.], sec. 720, and cases cited).

There is no foundation for the point upon which the respondent made the motion to dismiss.

It is impossible to sustain the judgment rendered, and therefore the proceedings must be reversed.

Ordered accordingly, with costs.

DAVIS, P. J., concurs.

N. Y. COMMON PLEAS.

JOHN A. DINKEL, respondent, agt. HENRY WEHLE, appellant.

Appeal — Undertaking — Disregard of defective undertaking.

Where the undertaking and notice of appeal described the judgment appealed from as a judgment entered on March eleventh, when in fact the judgment was entered on March twelfth:

Held, that the respondent was not required to move to set aside the undertaking, but was entitled to disregard it and issue execution.

Special Term, May, 1881.

Dinkel agt. Wehle.

MOTION by defendant to set aside execution, and for restitution, on the ground that plaintiff's proceedings were stayed by undertaking on appeal.

The undertaking described the judgment appealed from as a judgment entered on March 11, 1881, when in fact the judgment was entered on the 12th of March, 1881. A similar mistake was in the notice of appeal.

George F. Langbein, for respondent.

Henry Wehle, appellant in person.

J. F. DALY, J. — In *Parfitt* agt. *Warner* (13 Abb., 476) the supreme court held that where an undertaking on appeal was defective, but not void, the proper course for the respondent was to move to set it aside, but not to disregard it, and proceed to enforce his judgment.

The action was for a foreclosure of a mortgage, and the plaintiff was secured by the mortgaged property. This is an important consideration. In ordinary actions for the recovery of money, the defendant may gain time to dispose of his property by putting in an undertaking which affords no security. While plaintiff was making his motion to set aside the worthless instrument his security in the judgment debtor's property might be gone. In *Sternhaus* agt. *Schmidt* (5 Abb., 66) this court at special term held, that an undertaking which did not comply with the Code effected to stay. The undertaking and notice of appeal in this case by wrongly describing the judgment failed to comply with the Code. The proper description of the judgment is the most essential part of the notice. The sureties might not be liable upon an undertaking reciting an appeal from a judgment which did not exist as described in the instrument. At all events, they had a point on which to dispute their liability until determined by the court of last resort. The appellant in tendering such an undertaking, offered respondent, instead of security, a law

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suit. It is hardly proper, under such circumstances, to hold respondent to the obligation to respect the attempt to stay his proceedings, and to assume the burden of moving to set the defective undertaking aside. He is at least entitled to secure himself, if the appellant does not secure him, by a proper undertaking. These general observations apply to all cases of this kind. There is no fear of the respondent's security being affected by delay in this case, and there can be no question that the defect in the undertaking here was the result of misinformation.

While I cannot grant the motion to set aside the execution, it may not be out of place to say that an amendment would be allowed of course and without terms.

Motion denied, with ten dollars costs to respondent to abide event of appeal.

N. Y. SUPERIOR COURT.

JOHN R. VOORHIS, appellant, agt. STEPHEN B. FRENCH and another, respondents.

Extra allowance — Appeal — Order allowing, though granted by default, is appealable. — Code of Civil Procedure, section 3253.

In an action to restrain the recognition of a claim to an office, the defendants, upon plaintiff's default, on the case being called for trial, on notice, was granted an extra allowance:

Held, that the action was not one in which, under the Code, the court had power to grant an allowance; and that though the general notice of trial is sufficient notice for an application for an allowance upon a trial in cases where the law provides for an allowance, this being no case for an allowance, the order, though granted by default, is appealable.

General Term, June, 1881.

Before SEDGWICK, C. J., and FREEDMAN, J.

Voorhis agt. French.

APPEAL from such part of an order dismissing complaint as granted to defendant an extra allowance.

Chauncey S. Truax, for appellant.

Willard Bartlett and *Elihu Root*, for respondents.

SEDGWICK, *Ch. J.*—The action was brought to restrain the defendants, as police commissioners, from entertaining, receiving evidence upon, determining or adjudicating any claim or title to the office of commissioner of police, which might be made by the defendant Smith to the possession or enjoyment of said office in the place or stead of the plaintiff, who claimed to be rightfully entitled to the office, until there had been a competent adjudication as to the title of the office. The defendants gave notice of trial. The notice did not refer to any intended application for an allowance. After this notice plaintiff made default on the cause being regularly called, and his default was entered. In the order of default an extra allowance was granted.

The provision as to allowance under the Code of Civil Procedure is the same as under the former Code. By section 3253, in a difficult and extraordinary case, the court may award not exceeding five per centum upon the sum recovered or claimed, or "the value of the subject-matter involved." This does not comprise the present case. The subject-matter of the action could not have such a value of it estimated as to permit a calculation of per centage. The court had not power in such a case to grant an allowance.

It is claimed that, as the order was granted by default, it is not appealable, and it has been uniformly held that where a judgment has been given or an order made on default, after notice, there can be no appeal. The cases in which this has been held, put it always upon the ground that the party has had notice of the thing to be claimed against him, and that it is right to uphold what he has not appeared to oppose. This

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principle will not apply to a case where no notice has been given. It is the practice to apply for an allowance upon a trial of a cause without special notice. The general notice of trial is sufficient in cases where the law and practice provide for an allowance. It cannot be deemed, however, that such a notice can be implied in the notice of trial when it is not a case for an allowance, in the sense that the court has no power to grant one.

This conclusion is supported by the decision of the general term of the supreme court in *Wilkinson agt. Tiffany* (4 Abb. Pr. R., 99), that when the special term makes upon default an order which it had no authority to make, the party prejudiced may move, at special term, to set aside the order for irregularity, or may appeal from the order to the general term. The excess of authority in that case was that the special term had given a per centage of an amount claimed by the plaintiff, when in fact he had recovered much less than he claimed.

That part of the order which is appealed from should be reversed, with ten dollars costs and disbursements, to be taxed.

SUPREME COURT.

JOHN B. THOMPSON agt. THE ST. NICHOLAS NATIONAL BANK.

Complaint — causes of action which cannot be united in — Improper joinder.

Causes of action for the conversion and wrongful detention of personal property, and for an accounting between the parties, cannot properly be united in the same complaint.

Special Term, June, 1881.

George W. Parsons, for defendant in support of demurrer.

E. H. Hawke, for plaintiff, opposed.

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LAWRENCE, J.—*First.* I am of the opinion that the demurrers to the complaint generally, and to the first and second causes of action specifically, on the ground that the facts stated therein are not sufficient to constitute a cause of action, should be overruled.

Second. The fourth ground of demurrer must be sustained, for the reason that Capron and Merriam are necessary parties defendant to the complete determination of the third alleged cause of action stated in the complaint.

Third. The defendant is also entitled to prevail upon the fifth ground of demurrer, for the reason that causes of action for the conversion and wrongful detention of personal property, and for an accounting between the parties, have been improperly united in the complaint (*McDonald* agt. *Kountze*, 58 *How. Pr. Rep.*, 152; *Wiles* agt. *Suydam*, 64 *N. Y.*, 173; *Keep* agt. *Kaufman*, 56 *N. Y.*, 332).

There must be judgment for the defendant upon the fourth and fifth grounds of demurrer, with leave to the plaintiff to amend on payment of costs.

 COURT OF APPEALS.

JOHN C. SOUTHWICK, respondent, agt. FIRST NATIONAL BANK OF MEMPHIS, appellants.

Pleading—Complaint—Variance—Failure to prove cause of action alleged in its entire scope—Party cannot allege one cause of action and recover upon another—Bills, notes, checks and drafts—What is not a payment under mistake of facts—Collecting a diverted draft not a diversion—Demand and refusal.

Southwick, Thayer & Co., of Memphis, Tennessee, were the acceptors of a draft dated March thirteenth, and drawn to the order of J. N. Merriam & Son, of Boston, which the latter had endorsed and negotiated to Francis P. Merriam, who held it at maturity, and sent it to Memphis for collection. The acceptors being unable to pay this draft, were authorized by the payees (J. N. M. & Son), by a telegram sent from

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Boston to Memphis, to draw on the latter for the amount necessary to take up the old draft.

- S. T. & Co., on May sixth, drew as authorized, and instead of using the draft to take up the old one, applied it to the payment of an antecedent debt due by them to the defendants — a bank in Memphis — the latter having no notice of the telegram, or of the object or purpose of the draft of May sixth, and being ignorant of the misapplication. The defendants sent the draft to Boston for collection, where it was accepted and paid by J. N. M. & Son, in ignorance of its misapplication, and the defendants (before they were informed of the diversion) credited the proceeds on the debt due them by S. T. & Co. :

Held, 1. That although the defendants could not have enforced the draft against the acceptors, because they (the defendants) had not paid a new consideration for it, yet, having collected it, and applied the proceeds in payment of a debt (although an antecedent one), they could retain the money.

2. That although J. N. M. & Son accepted and paid the draft of May sixth in ignorance of the diversion and of the fact that the proceeds would not be applied to take up the draft of March thirteenth, yet this was not a payment "under a mistake of fact," within the rule that money so paid can be recovered; the mistake being as to an "extrinsic" and not an "intrinsic" fact.

3. That the defendants, in collecting the diverted draft, were not guilty of a conversion of it (*Comstock agt. Hier*, 73 N. Y., 269, *distinguished*).

4. That even if J. N. M. & Son could recover from the defendants the money paid by the former on the diverted draft, yet the action would not lie without a previous demand and refusal; and that the letter of J. N. M. & Son, mentioned in the opinion of the court, did not amount to a demand, and the answer of the defendants (also quoted in the opinion) did not amount to a refusal.

Plaintiff sued as the assignee of the rights of J. N. M. & Son (the acceptors and payers of the diverted draft), and also as the assignee of the rights of F. P. M., the owner of the draft of March thirteenth, for the payment of which the draft of May sixth was authorized to be drawn, and was paid. The complaint alleged that the defendants received the draft of May sixth upon a promise to collect it and apply its proceeds in payment of the draft of March thirteenth, then held by F. P. M.; that is to say, the action was upon the rights of the plaintiff as assignee of the holders of the latter draft. No such promise, either express or implied, was proved, but the plaintiff was allowed to recover upon the rights of J. N. M. & Son, the acceptors and payers of the diverted draft of May sixth; the plaintiff having set forth in the complaint the assignment to himself of the rights both of J. N. M. & Son and of F. P. M. :

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Held, that the complaint must be taken to set forth only one cause of action — to wit, the alleged promise of the defendants to apply the proceeds of the draft of May sixth in payment of the draft of March thirteenth, and that it was a fatal variance and error to allow the plaintiff to recover the money paid by J. N. M. & Son on the diverted draft.

Held, that the fact that the defendants were not “surprised” at the trial did not justify a recovery upon a cause of action not declared on (*Southwick agt. First National Bank of Memphis*, 20 Hun, 349, reversed).

March, 1881.

Barlow & Olney and *Francis P. Barlow*, for defendant and appellant.

John E. Burrill, for plaintiff and respondent.

EARL, J.—The defendant claims that the plaintiff failed upon the trial to establish by proof the cause of action alleged in his complaint. To determine whether this claim is well founded, we will first see what facts were proved, and thus ascertain for what cause of action the recovery was had, and then see if such cause of action is fairly embraced within the facts alleged in the complaint.

The material facts, as proved, are as follows: Southwick, Thayer & Co. were a firm doing business in Memphis, Tennessee, and J. N. Merriam & Son were a firm doing business in Boston. On the 13th day of March, 1873, George H. Thayer, a member of the Memphis firm, drew a draft upon that firm, which was accepted by them, for \$2,500, payable in Memphis in forty days to the order of the Boston firm. The latter firm indorsed the draft to F. P. Merriam, who became the owner and holder thereof, and he sent the draft to Memphis for collection. Shortly prior to the maturity of that draft, A. N. Merriam, of the Boston firm, being at Memphis, was notified by the Memphis firm that probably they would not be able to pay the draft at maturity, and was asked if, in that case, they might draw on the Boston firm a new draft, the proceeds of which should be used to take up the old draft. This request was assented to on

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condition that they should not draw the new draft without special authority. Early in May, the Memphis firm notified the Boston firm that they would not be able to take up the old draft, and requested permission to draw. Whereupon, on the fifth day of May, the Boston firm sent them a telegram as follows: "You may draw upon us at sight for \$2,500, to pay draft in our favor." On the next day the Memphis firm drew upon the Boston firm a sight draft for \$2,500, payable to their own order and indorsed by them, and their book-keeper, Wiggs, on their behalf, took it to the defendant's bank, with which they had had previous dealings and an account, and asked defendant's cashier if he would discount it and let his firm check out the proceeds. This the cashier refused, but he said he would take the draft and place it to the credit of the drawers on over-checks owing by them to the bank. Wiggs then consulted the drawers, and on the same day, with their assent, delivered the draft to the bank to be discounted, the proceeds to be credited to them in account, and they were thus credited. At that time the drawers were indebted to the bank in a much larger sum than the amount of the draft. The bank had no knowledge of the telegram authorizing the drawing of the draft, or of the purpose for which the drawers were authorized to draw. The bank thus became a *bona fide* holder of the draft for value, but not for value parted with at the time. Several days subsequently the Memphis firm drew a check on the defendant to pay the old draft, and it refused to pay the check on the ground that their account was not then good. After receiving the new draft and crediting its proceeds to the account of the drawers, the defendant sent it to its corresponding bank in Boston for collection. That bank presented it to the drawees for acceptance and payment, and it was accepted May tenth and paid May thirteenth, and the proceeds were credited by the Boston bank to the defendant, and were, by it subsequently checked out in the course of its business.

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The Memphis firm was not, at the time of the negotiation of the new draft, known to be insolvent, but they became openly insolvent in the latter part of June or the fore part of July, 1873, and were subsequently put into bankruptcy. This suit was not commenced earlier than the twenty-ninth day of July. At the latter date the Boston firm and F. P. Merriam assigned all their claims against the defendant to the plaintiff.

Upon these facts the court directed a verdict for the plaintiff, and its decision was probably based upon the theory that the defendant could be charged with a wrongful conversion of the draft, or upon the theory that the drawees paid the draft under a mistake of facts. In the opinion pronounced at the general term the judgment entered upon the verdict was sustained upon the latter theory, and the learned counsel for the plaintiff, in his argument before us, attempted to sustain it upon both theories.

It is entirely clear that no cause of action for a conversion of the draft, or to recover back money paid by mistake, is alleged in the complaint. On the contrary, the facts alleged show that there was no wrongful conversion of the draft, and that the money was paid under no mistake of any existing facts, and no mistake is in any way alleged or to be inferred from the language used.

The complaint first alleges the making of the old draft and that the same was owned and held by F. P. Merriam; that it had matured and become payable and had been forwarded to Memphis for collection; that the Boston firm authorized the new draft to be drawn upon them in order to provide funds necessary to pay the old draft, and agreed to pay such draft upon condition that the proceeds should be used for that purpose only; that the new draft was thereupon drawn and delivered to the defendant, which was notified of the object and purpose for which the draft was authorized to be drawn, and for which the same was drawn, and that it received the draft and undertook and agreed to collect the same for the

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purpose aforesaid, and that the proceeds thereof, when collected, should be applied to the payment thereof; that the draft was accepted and paid for the object and purpose and upon the condition aforesaid, but that the defendant neglected and refused to apply the amount paid upon the old draft although requested so to do; that the draft remains unpaid, and that J. N. Merriam & Co. and F. P. Merriam have sold and transferred the same and the moneys paid thereon to the plaintiff, together with all claim and cause of action against the defendant, upon or by reason thereof, or by reason of the premises and the matters before alleged; and judgment is demanded for \$2,500, and interest from May 6, 1873.

It is thus seen that the only cause of action alleged in the complaint is based upon the promise of the defendant to take the draft, collect it and apply the proceeds upon the old draft. This is plainly and explicitly set out. The proofs entirely failed to establish such a cause of action, and the objection that it did so fail was plainly and pointedly several times taken at the trial.

The Code requires that the complaint must contain a plain and concise statement of the facts constituting the cause of action, and that the pleadings must be liberally construed with a view to substantial justice between the parties; and in section 723 ample power is conferred upon the court to amend pleadings at any stage of the action, and where the amendment does not change substantially the claim or defense, to conform the pleadings to the facts proved.

Here, although the defect in the complaint was pointed out in due time upon the trial, no amendment was asked for or ordered. This is not a case where the pleadings can, after the trial, be conformed to the proof, as such an amendment would change substantially the claim of the plaintiff as alleged. This is not a case of mere variance or mere defect, but a case of failure to prove the cause of action alleged in its entire scope.

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Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. Here the defendant was brought into court to answer a complaint that he had violated his promise to apply the proceeds of the draft, and he took issue upon the alleged promise; and when he came to trial he was held liable, not for any breach of promise, but for the money paid by the Boston firm on the ground of a conversion of the draft or the mistake of facts which induced the payment of the money. The cause of action alleged was one held by the plaintiff as assignee of F. P. Merriam for the breach of the promise to pay the old draft owned by him. The cause of action for which the recovery was had was one which the plaintiff held as assignee of J. N. Merriam & Co. for the recovery of the money paid by them upon the new draft. It is no answer to this objection that the defendant was probably not misled in its defense. A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him; yet it is his right to have a complaint, to learn from that what he is sued for, and to insist that that shall state the cause of action which he is called upon to answer; and when a plaintiff fails to establish the cause of action alleged, the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured.

But, passing this point, the defendant further contends that the plaintiff ought to have proved a demand upon it for the draft or the money paid thereon before commencement of the suit, but that it failed to prove such demand.

It is not disputed by the plaintiff that such a demand was necessary, unless it was in some way waived by the defendant,

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or unless it was in some way estopped from insisting upon a demand.

Whether the action be treated as one for the conversion of the draft or of the money paid thereon, or for the recovery of money paid by mistake, a demand was a prerequisite to the maintenance of the action against the defendant, who lawfully and innocently received the draft and the money paid thereon. The obligation of a party to refund money voluntarily paid by mistake can arise only after notification of the mistake and a demand of payment (*Powers agt. Bassford*, 19 *How. Pr.*, 309; *Shuyter agt. Williams*, 37 *How. Pr.*, 109; *Stevens agt. Board of Education*, 3 *Hun*, 712; *Stacy agt. Graham*, 14 *N. Y.*, 492; *Freeman agt. Jeffries*, 4 *Exchequer [Law Reports]*, 189, 200, 201). Here the requisite demand was not only not proved, but was not alleged in the complaint. The only demand alleged was a request to apply the proceeds of the new draft upon the old one, in pursuance of the alleged promise of the defendant. No demand to pay the money to the plaintiff or his assignors is alleged, and none was proved to have been made before the commencement of the action. There was no proof that before the commencement of the action defendant had any knowledge of the telegram of May sixth, or of the purpose for which the drawers were authorized to draw the new draft, or of any claim that the drawees had paid the draft under any mistake, or that they claimed that the money paid should be refunded to them. There is no proof, even, that it had any knowledge that the draft or its proceeds had been improperly diverted. It is shown that it refused to pay a check drawn to take up the old draft and declined to pay that draft when presented; but it is not shown that they were, at the time when the check and draft were presented for payment or any other time before the commencement of the suit, informed of the circumstances now relied upon by the plaintiff connecting that draft with the new one. The plaintiff at the trial attempted to show a demand, or an excuse for not making one, by two letters;

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and unless such demand or excuse is found in these letters it is not found in the case. The first letter is dated May 13, 1873, and was addressed by the Boston firm to W. W. Thatcher, cashier of the defendant at Memphis. It is as follows :

SIR. — We are much surprised at the communication we have received this day from S., T. & Co., relating to the position you have taken about the draft on us, viz., not honoring their checks and allowing them to pay their draft in our favor. You had our explicit authority to draw on us (purpose specified also), and you have never yet had occasion rightly to doubt our honor and ability to pay all we contracted to, to the utmost farthing. We of course recognize your right to decline to cash their draft; that must be as your own judgment dictates. But to obtain their obligations and retain the funds for two weeks, thus putting us to annoyance and inconvenience without just cause, is not in accord with our New England ideas of honorable business dealing. All through this unfortunate affair we have tried to act towards you in a perfectly frank and honorable manner. We showed our hand to Mr. Davis, and offered him everything we could, and certainly don't "back water" now; but we can't submit to transactions of this kind. We would like to hear why you seem to have lost confidence in us. By letting S., T. & Co. pay our draft you don't hurt your case. Answer.

Yours, &c.,

J. N. MERRIAM & SON.

Here is no intimation that the new draft, or the money paid thereon, had been diverted or wrongfully converted; and there is no notice of any mistake inducing the payment of the draft, and no demand of any kind. To this letter Thatcher replied, under date of May 20, as follows :

GENTLEMEN. — Your favor of the 13th is before me, and I do not exactly understand it. Messrs. S., T. & Co. were overdrawn on our books say \$6,800; they deposited with me

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a sight draft on you for \$2,500, which was placed to their credit, and they were informed at the time that no check would be allowed against it, but it must go to reduce their overdraft. I had no intention of taking the draft except to reduce their account. If you understand the transaction differently, I would be pleased to hear from you, and we will compare notes regarding it.

Respectfully,

W. W. THATCHER,

Cashier.

This was a perfectly frank and fair letter explaining the situation, saying that he did not exactly understand the prior letter, which was certainly obscure and confusing, and asking for information in case the writers of the prior letter understood the facts differently from what he stated them. This letter contained no refusal to comply with any demand, if one had been made, and no position was taken therein which excused a demand or precluded the defendant from insisting upon one. This, so far as appears, ended the correspondence between the parties, and the suit followed.

It matters not that it is quite probable that the defendant would not have complied with a demand, if one had been made, for that does not dispense with the necessity of making one. When a demand is necessary, it is not excused by showing that the defendant would not probably have complied if one had been made. And it matters not that the defendant has, upon the trial, contested the plaintiff's right to recover. That has occurred since the commencement of the action, and the plaintiff's right of action must have been perfect when the suit was commenced.

The objection that no demand was made was distinctly taken on the trial, when the plaintiff offered in evidence the first letter, and in defendant's motion to nonsuit the plaintiff, at the close of plaintiff's evidence, and again at the close of all the evidence.

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We are, therefore, of opinion that the point we have just considered, was well taken. But, upon the assumption that the complaint is sufficient and that a proper demand was made, we are of opinion that the facts proved did not warrant the verdict ordered. Here there was no conversion of the draft by the defendant. It was delivered to it by the only persons at the time liable thereon. If the telegram of the drawees be regarded as an unconditional promise, in writing, to accept the draft, it did not bind them as acceptors because the defendant did not receive the draft "upon the faith" of the telegram (1 *R. S.*, 769, *sec. 8*; *Greele agt. Parker*, 5 *Wend.*, 414; *Bank of Michigan agt. Ely*, 17 *Wend.*, 508; *Burney agt. Worthington*, 37 *N. Y.*, 112; *Johnson agt. Clark*, 39 *N. Y.*, 216). After the defendant received the draft from the drawers it could hold it against them as drawers and indorsers thereof, and no one could control their dominion over it. The drawees could not have then sued it for the conversion or for the possession of the draft, or to restrain any use which it might choose to make of it. After the defendant obtained the draft all it did with it was to present it for acceptance and payment to the drawees, and after payment it delivered the draft, as we must presume, to them. It thus parted with the possession of the draft to them, and there was no wrongful conversion of it of which they could complain. And so this case is unlike the case of *Comstock agt. Hier* (73 *N. Y.*, 269), which is very much relied on by the learned counsel for the plaintiff. In that case Comstock was indorser of the note which it was claimed Hier had wrongfully converted, and it was held that Comstock was in such relation to the note that he could sue for a wrongful conversion thereof, or for the proceeds received upon the wrongful conversion thereof. The recovery was there upheld on the theory of a wrongful conversion of the note. But this recovery cannot be upheld upon that theory.

The only other theory suggested for the maintenance of this action is that of mistake; and much can be plausibly and

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forcibly said in favor of this theory. It is certainly true that if the drawees had known what they now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the old draft, they would not have accepted or paid the draft. But were they so mistaken that they can reclaim the money voluntarily paid by them? It is not every mistake that will lay the ground work for relief. It must be a mistake as to some existing fact; not as to something to happen or to be done in the future. It must be a mistake as to some fact not remotely, but directly, bearing upon the act against which relief is sought (*Dambmann agt. Schulting*, 75 N. Y., 55). If it were the rule to relieve against mistakes as to remote, or what are sometimes called extrinsic facts, great uncertainty and confusion would attend business transactions. Here the draft was genuine, addressed to the drawees, who had authorized it to be drawn, and it was held by the defendant, which could lawfully receive payment thereof. There was no mistake as to the intrinsic facts. The facts that the drawers had not acted in good faith with the drawees, or had placed the draft and its proceeds beyond their control, so that the old draft might not be paid, were too remote. The mistake of the drawees was rather as to the application of the money paid by them, a future fact. If the defendant had received this money and applied it upon the old draft, the precise expectation of the drawees would have been met, and there would have been no ground of complaint.

It is believed that no case can be found which holds that a party paying money under the circumstances existing have been allowed to reclaim it upon the ground of mistake. The defendant's case may rest upon principles decided in the cases of *Justh agt. The National Bank of the Commonwealth* (56 N. Y., 478), and *Stephens agt. The Board of Education* (79 N. Y., 183). In the *Justh case* one Gray borrowed plaintiff's checks for \$40,000 upon forged collaterals. He took the checks and had them certified to be good by the drawee

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bank, and then deposited them with the defendant, which received the money upon them. In that case the plaintiffs clearly parted with their checks under a mistake as to the genuineness of the collaterals. If they had known that they were forgeries they would not have parted with the checks. But upon the assumption that the defendant had parted with no value for the checks or upon the faith of the checks, this court held that the plaintiffs could not recover the amount of the checks, treating them as money paid to the defendant. The decision was also put upon the ground that the defendant had parted with value for the checks, and thus rests upon both grounds. In the *Stephens case* one Gill obtained of the plaintiff a sum of money upon the security of a forged mortgage, and paid the money to the defendant upon an antecedent debt; and it was held that the plaintiff could not reclaim the money. These decisions and others like them do not rest, as has been sometimes supposed, upon the ground that money has no earmark, but upon grounds of public policy. As said by judge ANDREWS in the *Stephens case*, "It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud;" and if the plaintiff in that case had shown that the very money he loaned to Gill had been delivered to the defendant the decision must have been the same. In the case of *Gammon agt. Butler* (48 *Maine*, 344), the plaintiff gave her husband \$100 in bills, to be by him carried and delivered to her children, and he paid the same money to the defendant upon an antecedent debt, and it was held that in an action for money had and received she could not recover, and the decision was based upon the same principles laid down in the cases of *Justh* and *Stephens*.

A large share of the business of the world is carried on by means of bills of exchange drawn upon persons liable to pay, or for the accommodation of the drawers, willing to pay them.

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They pass from hand to hand by indorsement or mere delivery, and are generally payable at places distant from the places where they are drawn. The protection and encouragement of trade and commerce, as said in the *Maine* case, and "considerations of public policy and convenience, and the security and certainty in business transactions," as said in the *Stephens* case, require that when such a bill is paid to one who holds it in good faith and for value, he should not be called upon afterwards to account for the money paid, perhaps at a distant time or place, after the accounts with the drawers have been settled and closed, upon proof that in transactions between the drawers and drawees of which the holder has no knowledge or means of knowledge, there has been some fraud or wrong, or mistake to the injury of the drawees.

If this money can be reclaimed, public policy is just as much contravened as it would be if the money had been drawn from the drawees by the drawers, and by them paid to the defendant. If the drawers had received this money from the drawees to pay the old draft, and had used it to pay their antecedent debt to the defendant, it is conceded that the drawees could not have reclaimed it. How can it make any difference in principle that the money was paid to the defendant directly by the drawees upon the order of the drawers? Whether the money was paid in the one way or the other, the principles of public policy and convenience lead to the same decision.

It matters not that the defendant, not being a holder for value parted with, when it took the draft, could not have enforced it against the drawees, even after acceptance. That was true in the case of the check in the *Justh* case. If the defendant in that case had parted with no value at the time it took the checks from Gray, it could not have sued the plaintiffs there as drawers. Yet, after the plaintiffs, through the drawee bank, had paid the checks, it could not reclaim the money paid. Here the drawees could have refused to accept the draft, and they might have refused to pay after

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acceptance, and might probably have successfully defended an action upon the draft. But having paid the draft, they must now look to the drawers, who made an improper use of the same, and who, in law, perpetrated a fraud upon them; and they cannot visit the consequences of that fraud upon the innocent defendant.

It is undoubtedly the rule in this state that one who signs commercial paper for the accommodation of another for a particular purpose, can defend when sued upon the paper by a person who took it as security for or to apply upon an antecedent debt without parting with value at the time, by showing that the paper has been diverted from the purpose intended. This rule is an exception from the general rule of commercial law, which protects one taking such paper in good faith and for value against the equities or defenses of all prior parties to the paper (1 *Parsons on Notes and Bills*, 218). While this exception has been much assailed in other jurisdictions, and is not recognized in England or in the federal courts, or in the courts of many of the states of the union, it is believed that it more frequently than otherwise tends to just results. The holder of the paper in such cases is generally soon made aware of the defense, and can take measures to protect himself from harm. But it is carrying the exception one step further to hold that the accommodation signer of such paper can pay it, and then, at any time before the statute of limitations has barred his right, and after time has complicated or changed the relations of the parties, sue to recover back the money thus paid.

The facts seem to disclose another ground of defense to this action. The draft was of value to the defendant. It had the right in any event to hold it and enforce it against the drawers, and the drawees could not reclaim the money paid and at the same time retain the draft. They should, before the commencement of the action, have demanded the money and tendered back the draft, and it is possible that a tender at the trial would be sufficient. As this point was not

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made on behalf of the defendant, we will notice it no further and give it no weight in our decision.

In this discussion we have assumed that the defendant took this draft without notice of the purpose for which the drawees authorized it to be drawn. We are justified in this assumption by the undisputed evidence. If the case had been submitted to the jury and they had found that the defendant had such notice, the verdict would have been so far against the evidence that it would have been the duty of the court, upon application, to set it aside.

Our conclusion therefore is, that this recovery cannot be upheld, and the judgment should be reversed and a new trial granted.

All concur except MILLER, J., dissenting; FOLGER, C. J., and ANDREWS, J., concur in result.

N. Y. COMMON PLEAS.

In the Matter of the Application of LORRETTA HOWELL, for the appointment of a trustee to succeed ELISHA BROOKS, deceased.

Trusts — What trusts descend to the legal representatives on the death of a trustee.

A trust fund, consisting of personal property, upon the death of a trustee descends to and the title vests in his legal representatives.

The provisions of the statute (*R. S.*, part 2, title 2, chap. 1, sec. 68) giving the title to a trustee to be appointed by the court, apply to trusts in real estate only.

Special Term, June, 1881.

John A. Bryan, for petitioner.

Henry A. Root, for administrator.

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LARREMORE, J. — The facts alleged in the petition were referred for proof, which has been made and reported to the court. It thereby appears that there came into the hands of Elisha Brooks, the deceased trustee, a trust fund amounting to \$12,027.05, against which no offset or reduction exists in his favor.

James Raymond, administrator with the will annexed of Elisha Brooks, deceased, appeared and was heard upon the proceedings thus had, and now appears by counsel in opposition to an application for the appointment of a new trustee and the payment of such trust fund to him.

It is conceded that the fund in dispute is personal property, and the question is whether such trust estate descended to the legal representatives of Brooks, or by operation of law vested in the supreme court (*Revised Statutes, part 2, title 2, chap. 1, sec. 68*). The authorities are conflicting upon this point. In *Hawley* agt. *Ross* (7 *Paige*, 103) the chancellor held that the Statute of Uses and Trusts was applicable in this respect to both real and personal property. This ruling was followed in *Curtis* agt. *Smith* (60 *Barb.*, 9), and there are several *dicta* to be found in the cases that appear to confirm this view. But the court of appeals, in *Bucklin* agt. *Bucklin* (1 *Abb. Ct. Appeals Dec.*, 242), and again in *Emerson* agt. *Bleakley*, (5 *Abb. Pr. [N. S.]*, 350) maintained the opposite theory that the provisions of the statute as to the vesting of trusts, upon the death of a trustee, relate exclusively to real estate (*See, also, Burn* agt. *Vaughan*, 5 *Abb. Pr. [N. S.]* 269; *Banks* agt. *Wilkes*, 3 *Sand. Ch.*, 99; *Matter of North Shore Staten Island Ferry Co.*, 63 *Barb.*, 556; *Gilman* agt. *Reddington*, 24 *N. Y.*, 13). The weight of authority must therefore control.

The trust fund has been sufficiently identified for the purposes of this application (*see Hooley* agt. *Gieve*, 9 *Abb. New Cases*), and the petitioner should not be put to her action where there is no dispute as to the facts or her rights in the premises.

Decree ordered in favor of petitioner.

Barbour agt. De Forest.

SUPREME COURT.

JEANIE DE F. K. BARBOUR, an infant, &c., agt. ROBERT W.
DE FOREST, executor, &c., and others.

*Will — Codicil — construction of — Direction as to accumulation of income —
when void — Effect as to residue of trust.*

The testator directed his trustees to set apart a third of the income of his residuary estate for the use of his great granddaughter during her life; the principal sum to go to her children, or, in case of her death without issue, to others. By a codicil, he directed that so much of such income as should not be needed, in the judgment of his executors, for her support, should be invested during her minority, and any accumulations of interest should be added to the principal:

Held, that though the terms of the codicil as to accumulations of income are in conflict with the provisions of the Revised Statutes, yet that this invalidity does not affect the residue of the trust, and that the invalid portion may be dropped.

Special Term, May, 1881.

Anderson & Man, for plaintiff.

H. W. De Forest, for defendants.

VAN VORST, J. — Burr Wakeman by his last will and testament, after making certain bequests, gave all the rest, residue and remainder of his estate, to his executors in trust, to hold the same, to collect and receive the income thereof; and he directed his trustees to set apart one-third part of such income for the use of his great granddaughter, Jeanie De Forest Knox Barbour, and they were directed to apply such equal third part of the income to the use of such great granddaughter during her life; and upon her death, the principal out of which such one-third part of the income of his estate arose, was given to her child or children surviving her; and in case of her death without issue her surviving, there was a gift over of the principal of the trust estate to others.

By a codicil to his will, thereafter made and executed, the

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testator directed "that so much of the income of that share of his residuary estate set apart for his great granddaughter, Jeanie De F. K. Barbour, as should not be needed, in the judgment of his executors, for her support, should be retained and invested by them during her minority, and any accumulations of interest should be treated and dealt with as part and parcel of the principal of such share."

The plaintiff, the great granddaughter, is an infant about nine years of age, and this action is brought on her behalf by her guardian, for a judicial determination of her rights under the will and codicil, and especially as to the validity of the codicil, which provides for the investment of accumulations of income.

By the terms of the codicil, these accumulations are to be treated as part and parcel of the principal of the share, and in substance are to be added thereto, and be paid over to the person or persons entitled to the eventual estate. Such was evidently the intention of the testator, to be gathered from the words of the codicil to his will, which materially changed the disposition originally made.

Having regard to the persons, some of whom are not in being, and perhaps may never be, for whose benefit these accumulations of income are authorized, the terms of the codicil are in direct conflict with the provisions of the Revised Statutes.

Accumulations of income are authorized for the benefit of "one or more minors then in being," but are to terminate at the expiration of their minority (1 *Rev. Statutes*, 726, *secs.* 37, 38; *idem.*, 774, *sec.* 4).

The accumulations authorized by the testator are not for the benefit of the plaintiff, a minor, but are to form a part of the principal of the share which is given to the possible issue of the plaintiff, who may, perchance, be of full age upon her death, or contingently of Louisa W. Knox (a granddaughter of the testator, who is of full age) or of her possible issue, and who are not now in being.

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This direction for accumulation of income being by force of the statute void, the question arises: How does this invalidity affect the residue of the trust, and how are these accumulations to be disposed of?

I conclude that the invalid portion may be dropped without disturbing the residue of the trust or the remaining testamentary direction in this regard.

The codicil modifies the original provisions of the will, which devoted the whole income of the one-third part of the residuary estate to the use of the testator's great-granddaughter during her life, by directing that so much thereof as shall not, in the judgment of the executors, be needed for her support, should be retained and invested by them during her minority. The codicil to that extent has no invalidity; the statute is violated by the subsequent disposition of these investments of income, which are allowed to accumulate.

Under the will itself any surplus of income, over and above what was needed from time to time for the support of the infant, would, without doubt, and that lawfully, have been held and allowed to accumulate for the infant during her minority, although no express directions as to such accumulations are given; and by dropping the words "and any accumulation of income shall be treated and dealt with as part and parcel of the principal of such share," which is the only direction which is invalid, the will itself is left intact and provision is made for accumulation of surplus income for the benefit of the plaintiff during her minority, and in the event of her death before attaining her majority, the accumulations of income would go to her next of kin, but should she reach her majority the accumulations would belong to her, and not to those entitled to the next eventual estate.

This is not making, as is suggested by the learned counsel for the plaintiff, a new will for the testator. It is, in fact, in entire harmony with the will as first made. It eliminates from the codicil what is conceded to be illegal, and leaves so much thereof as does not conflict with the original gift of

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the income, but rather supplements it, and suggests what would doubtless have been done by the trustees with the surplus income during the minority of the plaintiff.

It still remains, however, with the trustees, according to their judgment, to determine how much of the income shall be applied for the purpose of the support of the infant, and the residue should be invested and held by them. This was clearly the intention of the testator; but they are to hold for the use and benefit of the plaintiff during her minority.

Judgment is directed for the construction of the will, and the determination of the rights of the infant, and the duty of the trustees, accordingly.

FRANKLIN C. CORNELL, Administrator, &c., agt. UTICA,
ITHACA AND ELMIRA RAILROAD COMPANY, &c.

Preliminary injunction against a railroad, forbidding the issuing of bonds or the payment of principal or interest on same, or the issuing of stock certificates — Under what circumstances should be continued.

The plaintiff's intestate, E. C., was the contractor for the building of a portion of the Utica, Ithaca and Elmira Railroad. He was paid in the bonds and stock of said road upon which, as collateral, he had borrowed large sums of money, and by reason of his large indebtedness an arrangement was made whereby one G., in the interests of the contractor and owners of the road, went to England and secured the sale of the bonds of the road, the proceeds being first applied to the payment of E. C.'s indebtedness secured by said bonds. Afterwards certain other payments were to be paid out of the proceeds of bonds sold, including a considerable amount to E. C. H. S. K. & Co., of London, were the bankers through whom the sales of bonds in England were made. Afterwards the interest upon these bond not being paid, the mortgage given to secure the same was foreclosed. At the time of the sale H. S. K. & Co., or their survivor, owned or controlled, as if owner, some 946 bonds of \$1,000 each; the plaintiff owned or claimed to own some 341 bonds of \$1,000 each, and the remainder of an issue of \$1,365,000 was held and owned by various persons in small amounts. The plaintiff's title to a portion of the bonds claimed by him is contested by some of the defendants. If any of the bonds claimed by plaintiff have been

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sold, the plaintiff claims the proceeds. The sale of the road was made April 30, 1878, for the sum of \$50,000, and was bid in by an agent of H. S. K. & Co., the plaintiff not bidding thereon. The plaintiff alleges that prior to said sale it was agreed between K. & Co. and plaintiff that said railroad should be bid in for the joint benefit of plaintiff and K. & Co., in proportion to their respective rights as owners and holders of said bonds; that as soon as the title should be perfected a new company should be organized, which should execute a first mortgage upon said road and issue bonds of the new company, to plaintiff and K. & Co., to the same extent and amount for which they were respectively owners and holders of bonds in the old road, and that in pursuance of such agreement the plaintiff abstained from bidding on said property, and K. & Co. bought the same. Afterwards a new company was formed by the name of the Utica, Ithaca and Elmira Railway Co., a defendant herein, and the title to the property was transferred by the purchaser to it. As the title and ownership of plaintiff to the number of shares claimed by him was controverted by some of the defendants, this action was brought in June, 1878, among other things, to have determined and adjudged the rights and interests of the several parties to this action, and to have enforced specifically by the Utica, Ithaca and Elmira Railway Co., the contract or agreement under and by virtue of which H. S. K. & Co., became the real purchasers of said railroad property upon the foreclosure sale. In November, 1880, an injunction was issued forbidding the Utica, Ithaca and Elmira Railway Co., from issuing bonds and securing their payment by a first mortgage upon its property in violation of plaintiff's equitable rights, it being alleged that such intention existed. In December, 1880, upon allegation of information that a mortgage for \$600,000 had been put upon said property by the railway company, and that the bonds were ready to issue or had been taken by H. S. K. to England to be issued, a further injunction was issued restraining the defendants from paying any part of the principal or interest of such bonds until the further order of this court. In February, 1881, upon allegation that George Rice, the president of said railway company, was about to issue to K. & Co., stock certificates to a large amount in said railway company, a third injunction was issued enjoining such issue of stock by the company to K. & Co. Upon application to continue these injunctions pending the litigation:

Held, first, that as the only issue of fact of importance in the case relates to the alleged contract under which the defendant bid in the railroad upon the foreclosure, and that fact remains in doubt, this court ought not, if it can fairly be avoided, to pass upon the merits in such a way as will, in effect, destroy the plaintiff's cause of action and strip him of relief to which a trial upon the merits might show him entitled. The plaintiff might be remediless without the aid of injunctions. The

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defendants are protected by adequate security for any loss they may sustain. Reference should be had to the nature and extent of the injury—to the consequences which may follow the granting or withholding the injunction. It is usually sufficient to establish a *prima facie* case entitling plaintiff to a specific performance of a contract. The result of the final hearing need not be shown to be necessarily in his favor.

Second. The statute of frauds does not apply to such a contract as is alleged in this case. Plaintiff and K. had a joint interest and *quasi* ownership of the railroad company. Their contracts for the disposition of their property carried into effect by virtue thereof are valid and effectual. The plaintiff has parted with his interest in and claim upon the promise of K. to repay him out of the proceeds of property that went into K.'s hands by virtue of the contract. It was a permission and agreement by plaintiff that the defendant K. might take possession and title to the property discharged from plaintiff's lien, provided and upon the condition that defendant should restore the lien to plaintiff after his purchase. Such a transaction is not within the statute of frauds.

Third. There is nothing in the transaction that should render it void out of consideration for public policy. It was no combination to suppress bidding at a judicial sale. The agreement by one that he will buy for the benefit of both and the absence from bidding of the other by reason thereof would not present a question of public policy.

Fourth. If the property in K.'s hands was charged with an equitable lien in favor of plaintiff, it is equally so in the hands of the railway company. To all intents the two, K. and the railway company, are one and the same, except, perhaps, to the extent that the purchasers in good faith of the bonds and stock of the railway company may have acquired rights prior to but in fraud of plaintiff's lien.

Fifth. A *lis pendens* is not a full and complete protection to the rights of the plaintiff. The *lis pendens* would not protect plaintiff's rights in or to the personal property which, by the \$600,000 mortgage, has been included as a part of the mortgaged property.

Sixth. Where the real estate and road-bed extend through several counties, and there is no proof that the complaint in the action was filed in any one of said counties, a notice of *lis pendens*, if filed, would be inoperative

Tompkins Special Term, March, 1881.

MOTION for continuance of preliminary injunction, *pendente lite*.

Irving G. Vanh, for the motion.

Samuel Hand and *Charles H. Tweed,* opposed.

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BOARDMAN, *J.* — Ezra Cornell, plaintiff's intestate, was the contractor for the building of a portion of the Utica, Ithaca and Elmira railroad. He was paid in the bonds and stock of said road, but as these were not available for sale in the open market he had borrowed large sums of money upon them as collateral. His efforts as contractor were embarrassed for want of money and by reason of his large indebtedness. An arrangement was made whereby one Greenough, in the interests of the contractor and owners of the road, went to England and secured the sale of the bonds of the road, the proceeds being first applied to the payment of Mr. Cornell's indebtedness secured by said bonds. Afterwards certain other payments were to be paid out of the proceeds of bonds sold, including a considerable amount to Cornell. Henry S. King & Co., of London, were the bankers through whom the sales of bonds in England were made. Afterwards the interest upon these bonds not being paid, the mortgage given to secure the same was foreclosed. At the time of the sale said H. S. King & Co., or their survivor, owned or controlled, as if owners, some 946 bonds of \$1,000 each; the plaintiff owned, or claimed to own, some 341 bonds of \$1,000 each, and the remainder of an issue of \$1,365,000 was held and owned by various persons in small amounts. The title of the plaintiff to a portion of the bonds claimed by him is contested by some of the defendants in this action. If any of the bonds claimed by plaintiff have been sold, then plaintiff claims the proceeds thereof as belonging to him.

The sale of the road was made April 30, 1878, for the sum of \$50,000, and was bid in by an agent of said H. S. King & Co., the plaintiff not bidding thereon.

The plaintiff alleges that prior to said sale it was agreed between King & Co. and plaintiff that said railroad should be bid in for the joint benefit of plaintiff and said King & Co., in proportion to their respective rights as owners and holders of said bonds; that as soon as the title should be perfected a new company should be organized, which should

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execute a first mortgage upon said road and issue bonds of the new company to plaintiff and said King & Co., to the same extent and amount for which they were respectively owners and holders of bonds in the old road, and that in pursuance of such agreement the plaintiff abstained from bidding on said property, and King & Co. bought the same.

Afterwards a new company was formed by the name of the Utica, Ithaca and Elmira Railway Company, a defendant herein, and the title to the property transferred by the purchaser to it.

As the title and ownership of plaintiff to the number of shares claimed by him was controverted by some of the defendants, this action was brought in June, 1878, among other things, to have determined and adjudged the rights and interests of the several parties to this action, and to have enforced specifically by the Utica, Ithaca and Elmira Railway Company the contract or agreement, under and by virtue of which H. S. King & Co. became the real purchasers of said railroad property upon the foreclosure sale April 30, 1878. The plaintiff claimed to have an equitable lien upon said railway property for the amount of his debt by virtue of said contract. A demurrer to the complaint was interposed by King, which was overruled at special and general terms, and an amended answer has, on the day when this motion is heard, been served.

In November, 1880, an injunction was issued forbidding the Utica, Ithaca and Elmira Railway Company from issuing bonds and securing their payment by a first mortgage upon its property in violation of plaintiff's equitable rights, it being alleged that such intention existed.

In December, 1880, upon allegation of information that a mortgage for \$600,000 had been put upon said property by the railway company, and that the bonds were ready to issue, or had been taken by H. S. King to England to be issued, a further injunction was issued restraining the defendants from paying any part of the principal or interest of such bonds until the further order of this court.

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In February, 1881, upon allegation that George Rice, the president of said railway company, was about to issue to King & Co., stock certificates to a large amount in said railway company, a third injunction was issued enjoining such issue of stock by the company to King & Co.

The hearing upon the application to continue these injunctions pending the litigation, has, by consent, been deferred from time to time to this day.

The plaintiff claims to hold an equitable lien upon the property of the railway company, which should be enforced and upheld in preference to stockholders or creditors of the new company, and that the various acts done or threatened by said company are calculated to destroy his rights or embarrass his remedy and imperil his security by the creation of new and hostile interests.

The defendant King denies that any agreement, as is claimed by plaintiff, was made with plaintiff before said foreclosure sale, and denies that the plaintiff had any interest in the property after the sale, either legal or equitable.

The defendant also insists that, if any agreement was made, it was void in law and within the statute of frauds, and was terminated by a formal notice that the sale would convey entire interest to the purchaser absolutely free from any equities or liens whatsoever, and that the plaintiff and others must protect their own interests upon such sale.

The defendant alleges that whatever rights the plaintiff has, if any, are protected by his notice of the pendency of the action filed in this case; that two provisional remedies will not be granted by the courts at the same time, and the danger of injury to plaintiff from defendant's acts could not so exist as to justify these injunctions while the *lis pendens* gave constructive notice to all of plaintiff's rights. It is also claimed by defendants that the mortgage for \$600,000 was put upon the property of the railway company and the bonds issued thereon to *bona fide* purchasers prior to the issuing of the first injunction, which injunction is therefore futile and worth-

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less, and that the third injunction is too broad in restraining King & Co. from disposing of any bonds in the possession or under the control of them or either of them, thus covering bonds in their possession to which they have no title, and in which they claim no interest.

It is agreed by counsel for the plaintiff that the third injunction may be modified so as to affect only such bonds as the defendant King owns or has title to, in whole or in part, and it is so modified.

The only issue of fact of importance in this case relates to the alleged contract under which the defendant bid in the railroad upon the foreclosure. If the plaintiff's witnesses tell the truth, the title taken on such sale was for the joint benefit of plaintiff and defendant King, according to their several interests. If the defendant's witnesses tell the truth, the plaintiff has not the shadow of a cause of action against King or the railway company, and his complaint should be dismissed.

What the fact is remains in doubt, and this court ought not, if it can fairly be avoided, to pass upon the merits in such a way as will, in effect, destroy the plaintiff's cause of action, and strip him of the relief to which a trial upon the merits might show him entitled. The plaintiff might be remediless without the aid of injunctions. The defendants are protected by adequate security for any loss they may sustain (*Rector, &c.*, agt. *Keech*, 5 *Bosw.*, 691; *Speer* agt. *Cutter*, 5 *Barb.*, 486). Reference should be had to the nature and extent of the injury—to the consequences which may follow the granting or withholding the injunction (*High on Inj.*, sec. 1136; *Heath* agt. *Pres't, &c.*, 7 *Abb. [N. S.]*, 251; *Bruce* agt. *D. and H. Canal Co.*, 19 *Barb.*, 371; *Gallatin* agt. *Oriental Bank*, 16 *How.*, 253). It is usually sufficient to establish a *prima facie* case entitling plaintiff to a specific performance of a contract. The result of the final hearing need not be shown to be necessarily in his favor (2 *High on Inj.*, sec. 1120; *secs.* 1121, 1122; 2 *Wait's Prac.*, 3, 6, 8, 11, 12).

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For these reasons I shall not hold that the plaintiff has no cause of action and is not, therefore, entitled to any protection. It is safer and wiser to assume, for the purposes of these motions, that the questions of fact *may* be determined upon trial in plaintiff's favor. In that event he might be robbed of his relief if this court, on an interlocutory order, should dissolve the injunctions by which his remedy is secured.

It is proper also to consider the facts that the defendant King, who is and has been the principal and responsible actor in this transaction, is a resident of England; that the railway company as at present organized is not possessed of great value, as defendant charges, of not sufficient value to satisfy the claims of plaintiff and defendant King in cash; that \$600,000 have already been issued by the railway company in bonds secured by a mortgage upon the road, as defendant asserts, to *bona fide* holders who will doubtless claim priority over the plaintiff, though plaintiff may succeed; that said King claims now the stock of said road to nearly two millions of dollars has been issued and disposed of by him to *bona fide* purchasers; that each *bona fide* purchaser of the stock, bonds or property of said company may reasonably claim that they purchased in ignorance of plaintiff's alleged claim and lien, and that much of the property of said company may be transferred without the knowledge and against the alleged rights of the plaintiff, who could, with extreme difficulty, follow the property or protect his liens thereon or against such sale or transfer thereof. Again this action was begun in June, 1878. After the delay incident to a demurrer to the complaint an amended answer is served, in March, 1881, by the defendants, and yet the only essential issue between plaintiff and the railway company and King is the alleged contract under which King bid in the old road April 30, 1878. The evidence touching the existence of such contract is apparently confined to five or six persons at most, and could have been tried and disposed of at any time within the last two and one-half years if the defendants had desired to do so. In the meantime, and in defiance of

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plaintiff's alleged rights, they have, as they allege, mortgaged the road and issued its stock to purchasers in good faith, who will doubtless claim priority over any equitable lien of plaintiff upon the same property.

I have said the essential issue relates to the alleged contract on the foreclosure sale. That, I take it, is true. For if such contract is not found to have been made, that will be the end of plaintiff's case. If it shall be found to have been made the defendant can, if the law so adjudge, easily comply by the issue of the requisite bonds and the delivery of the same into court so as to be absolved from all further litigation or embarrassment arising therefrom. One-half the time, labor and expense applied to the litigation by demurrer, and to the effort to get rid of these injunctions, would have disposed of every question of fact at issue between plaintiff and defendants, King and the railway company, and left only the entry of such a judgment upon the merits, as the law and the facts so determined should justify. It is not well to try a case by indirection or upon affidavits when as simple a mode lies in a trial upon the merits.

We shall assume then the contract as alleged by plaintiff for the purposes of this application, but without passing upon the merits or deciding anything as to the credibility of the witnesses whose affidavits have been read. That question is sent to the trial court, free from any expression of conviction by this court, which can influence the judgment or affect the decision of the judge who shall try the case on its merits.

It is urged, however, that a contract, such as is alleged, would be void, first, as in violation of the statute of frauds, and, second, as against public policy.

The statute of frauds does not apply to such a case as the present. Plaintiff and King had a joint interest and *quasi* ownership of the railroad company. Their contracts for the disposition of their property, carried into effect by virtue thereof, are valid and effectual (*Traphagan agt. Burt*, 67 *N. Y.*, 30; *Ryan agt. Dox*, 34 *N. Y.*, 307). The case is very

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different from *Levy* agt. *Bush* (45 *id.*, 589), where the plaintiff had parted with nothing and done nothing to entitle him to enforce the contract. Here the plaintiff has parted with his interest in and claim upon the promise of King to repay him out of the proceeds of property that went into King's hands by virtue of the contract. It was a permission and agreement by plaintiff that the defendant King might take possession and title to the property discharged from plaintiff's lien, provided and upon the condition that defendant should restore the lien to plaintiff after his purchase. Such a transaction is not within the statute of frauds.

Nor is there anything in the transaction that should render it void out of consideration for public policy. The interests of these parties in the property to be sold were not diverse and hostile. The property was being sold to pay their debts. Their interests were, therefore, in harmony, and they were equally interested in securing their debts by and through the sale. It was, therefore, no combination to suppress bidding at a judicial sale. Their relations were very like those of two partners under similar circumstances purchasing at a foreclosure. The agreement by one that he will buy for the benefit of both, and the abstinence from bidding of the other, by reason thereof, would not present a question of public policy (*Barne* agt. *Drew*, 4 *Den.*, 287; *Ingraham* agt. *Baldwin*, 12 *Barb.*, 9, 21).

It is further urged by the defendants that such a contract as is alleged by plaintiff could not be legally carried into effect by the new railway company, because it would thus execute a mortgage for an amount in excess of its entire value and without receiving therefrom a dollar of consideration. This, it is insisted, no railroad company, organized under the laws of this state, has power to do.

Conceding these propositions true, they do not apply to the case under consideration. The railway company acquired the title that King purchased at the foreclosure, subject to any equitable rights of plaintiff. What has the railway company

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paid King or plaintiff for the road franchises, &c.? The answer must be nothing, unless the \$600,000 in bonds and \$2,000,000 in stock were issued to King to pay for the value of his interest in the property at the time of the foreclosure. If it was so paid, then plaintiff claims he also, under his contract, was entitled to be paid in like manner and in proportion that his interest bore to King's. It is difficult to see how the railway company could pay King for his interest and could not pay plaintiff for his equitable interest in the same property in King's hands (2 *Wait's Pr.*, 47; *Cranston agt. Plumb*, 54 *Barb.*, 59).

If, on the contrary, these bonds and stock certificates have been issued to actual purchasers, and have been paid for in cash to the company, then it has paid nothing for all the property sold under the foreclosure and transferred to it by King or his order. Upon what principle can this railway company claim to hold and own a large and valuable property upon which plaintiff has or claims an equitable lien, without having paid one dollar therefor? The lien that was to be given by the railway company to plaintiff and King by virtue of the contract, was the consideration to be paid for the road franchises, &c. It has either paid nothing or it has paid only to King, ignoring and refusing to pay plaintiff's claim. Certainly the statute does not create the right in newly organized railroads to refuse to pay the purchase-price. There is, there can be no pretense, that the railway company is not equally responsible with King for the performance of any contract made with plaintiff by King as to the foreclosure. If the property in King's hands was charged with an equitable lien in favor of plaintiff, it is equally so in the hands of the railway company. To all legal intents, the two, King and the railway company, are one and the same, except perhaps to the extent that the purchasers in good faith of the bonds and stock of the railway company may have acquired rights prior to, but in fraud of plaintiff's lien (*Blatchford agt. Ross*, 54 *Barb.*, 42; 2 *Wait's Pr.*, 47).

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There is a further point raised by the defense, to wit, that an injunction will not be granted, or if granted will be set aside when a *lis pendens* already filed secures to the plaintiff all that the injunction has, or is intended to secure to him.

The plaintiff replies to such claim that there is no proof of the filing of the notice in any county besides Tompkins, while the real estate and road-bed extend through the counties of Chemung, Tioga and Cortland, as well as through Tompkins. There is no proof that the complaint in this action was filed in any one of said counties, not even in Tompkins. And hence a notice, if filed, would be inoperative (*Burrough agt. Reiger*, 12 *How.*, 171; 48 *N. Y.*, 585; *Old Code*, sec. 132). For these reasons it cannot be safely assumed that the plaintiff's rights are protected by the filing of a notice of the pendency of the action in the counties through which the road runs.

But we will disregard these answers of the plaintiff to the objection of the defendants, which answers may be more technical than real, and put our decision upon the broader ground that a *lis pendens* is not a full and complete protection to the rights of the plaintiff as claimed by him. His original mortgage not only covered the road-bed, but the personal property belonging to the old railroad company, and such real and personal property was sold and bid in by King on the foreclosure. All of the property so bid in was charged with any equities of the plaintiff under his contract with King. The *lis pendens* cannot protect plaintiff's rights in or to the personal property which, by the \$600,000 mortgage has been included as a part of the mortgaged property (*Mills agt. Bliss*, 55 *N. Y.*, 141). In the respect just indicated, the present case is distinguished from those cited by counsel for the defense. Besides the stock certificates are not covered by the notice, and it may be a question whether persons acquiring certificates of stock in a corporation and paying value therefor without notice of plaintiff's equities could be compelled to submit to them.

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It is not perhaps necessary to question the authority of *Osborne* agt. *Taylor* (5 *Paige*, 515), and others founded thereon cited by the defendant. If the *lis pendens* protects the party filing it to the same extent and in as full a manner as an injunction would, it must be conceded that an injunction would be useless. Under such facts an application for an injunction would be without merit.

But in the present case we have rights alleged to be founded upon latent equities against property real and personal in the hands of King. King transfers such property to a railway corporation, concealing plaintiff's equities and ignoring his rights. As the apparent owner of the property that is transferred to the corporation, he becomes the apparent owner of the stock of the railway company, and controls its actions. As such apparent owner, the stock is issued to him by the officers of the road. At his dictation, and because he appears to have supreme authority and ownership, a mortgage for \$600,000 is put upon the road, its iron ties, equipment and franchises, and the bonds issued thereon to him and disposed of by him at his pleasure. The stock has been, or may be, in like manner sold by King and transferred to others. Each day may add to the complication and difficulties in the way of securing an adjustment of plaintiff's rights, if he shall finally be adjudged to have any. Under such a state of facts it would seem to be eminently just and proper for a court of equity to command a defendant to desist from disposing of the property alleged to be subject to an equitable lien in favor of the plaintiff until the rights of the plaintiff can be ascertained, and if determined in his favor, that the property may be found to satisfy his demands. The public are entitled to protection against the wrongful acts of persons in possession of corporate property whereby they may lose their money paid for the purchase, or may be involved in complicated and fruitless litigation.

Whether or not the plaintiff was bound to tender a proportion of the expenses of the foreclosure sale, and of his bonds

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and demand from King and the railway company, a performance of their contract does not seem to me a proper subject for consideration upon this motion. It will be best considered on the trial of the action.

For the reasons assigned, I think the injunctions heretofore granted should be continued *pendente lite*, except that the injunction enjoining the said King and others from selling, &c., any bonds, &c., of the railway company in the possession, &c., of the said King, should be so modified as to refer to, and include only such bonds, &c., of the railway company defendant as were or are owned in whole or in part by the defendant King, his agents, &c.

The form of the order if necessary to be settled by me.

SUPREME COURT.

MICHAEL MURPHY agt. JOHN L. C. NORTON *et al.*

Title to land swallowed by the sea — in whom title is.

If land once submerged by the sea shall again be left by the reflex and recess of the sea, the owner shall again have his land as before, if he can make out where and what it was.

Although while the land continues covered by the sea the title is in the sovereign, yet when the land by natural means emerges, the title of the original owner is restored.

Special Term, May, 1881.

THIS suit was a test case, covering the ownership of four miles of beach extending from Rockaway Beach to Long Beach. After the sea had cut off the sea-front of the main land between the points mentioned, a beach was reformed outside the main land and divided from it by a bay of navigable water. The owners of the main land took possession

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of the newly formed beach, claiming to own that portion lying within their respective boundaries, for the reason that the beach had formed within the limits of their ancient boundaries; but the town of Hempstead claimed the whole of the new beach as an accretion upon Long Beach, and leased the same to the defendants for fifty years at \$1,000 per year. Before the defendants could take possession under their lease, the plaintiff procured an injunction restraining them from interfering with his possession; and by the decision of judge PRATT the injunction is made perpetual.

Eugene F. Daly and John E. Parsons, for plaintiff.

W. N. Dykman, Benjamin W. Downing, Gratz Nathan and Jefferson N. Levy, for defendants.

PRATT, J. — The plaintiff claims that he and those through whom he derives title have at all times owned to the ocean; that as far back as 1797, the ocean line was outside of the present ocean line; that though the beach at plaintiff's property washed away about 1860, it has, since 1870, emerged; and that being within the plaintiff's original boundaries, he is in law the owner. Plaintiff also claims that he and his grantors have at all times been in undisturbed possession to the ocean; and he argues that, as against defendants, this entitles him to protection unless defendants show title in themselves.

As regards the questions of fact, we think the plaintiff has established his claims as stated above; and the principal matters to be discussed are questions of law resulting from certain phases of the case brought out by defendants, which they contend destroy plaintiff's right to the relief he seeks. As the facts will appear in the findings, they need not be recited here.

The general principle controlling this case may be found in *Angel on Tide Waters* (pp. 76 to 80). See, also, *Hargrave's Law Tracts* (*Sir Matthew Hale's De Jure Maris*), 36, 37:

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“It may be said that if land once submerged by the sea shall again be left by the reflex and recess of the sea, the owner shall have his land again as before, if he can make out where and what it was.”

The defendants cite *Matter of Hull agt. Selby Railroad Co.* (5 *Mees. & W.*, 328) as showing that the title to land swallowed by the sea is vested by the sovereign power. In that case the lands, while yet under water, were taken by eminent domain. Damages being awarded and paid into court were adjudged to belong to the crown and not to the former owner. This case shows that while the land continues to be covered by the sea the title is in the sovereign. But the well settled rule remains that when the land, by natural means, emerges, the title of the original owner is restored.

From this rule it results, in the case at bar, that the title to the premises in suit is vested in the plaintiff, which decides the present case. For it clearly appears that the injury to the plaintiff from the unlawful entry threatened by defendants is not one that can be accurately measured by money damages, and that an action at law would by no means give adequate relief.

There is nothing in the position of defendants entitling them to extreme consideration.

The owner of lands bordering upon the ocean is subjected to dangers from the elements from which it is vain to seek protection. But when the sea throws back to him that which it has previously torn away, he should not be driven to scramble for his own.

Judgment for plaintiff as prayed for in complaint.

Thebaud agt. Schermerhorn.

SUPREME COURT.

MARY E. C. THEBAUD agt. JULIA M. SCHERMERHORN.

Married women — Marriage contracts — Trusts created by a woman contemplating marriage — The act of 1849 (Laws of 1849), chap. 375, inapplicable to a trust created by a beneficiary herself, after the passage of the enabling act of 1848.

The plaintiff, in 1857, in contemplation of marriage, gave her property by a trust deed to trustees to pay her the income for life, with a provision for her husband if he survived her; but if she survived, the property was to go to such person or persons as she might by will direct, and in default of a devise by her it was to descend to her heirs. The plaintiff survived her husband and remarried; and subsequently, in 1872, the trust property was reconveyed to her by the surviving trustee, under the provisions of the act of 1849:

Held (in an action for the partition of some of this property which plaintiff held as tenant in common with one of the defendants), that plaintiff, by the trust deed, divested herself of all her estate in the property, and that she cannot recall the trust; that the Supreme Court, before the act of 1849, had not power to destroy such trust, and said act did not give authority for its extinguishment, the purpose of the act being to enable trustees, after the act of 1848 had freed married women from their peculiar disabilities, to reconvey to the beneficiaries trusts created prior to that act for the benefit of women contemplating marriage.

Special Term, June, 1881.

T. James Glover and T. J. Barry, for plaintiff.

E. M. Felt, for defendant.

LARKEMORE, J.— This case was submitted on the pleadings, and the facts therein alleged are assumed to be true for the purposes of this adjudication. On October 27, 1857, Mary E. Guibert (the plaintiff), then unmarried, entered into a tripartite agreement between herself of the first part, James T. Guibert and John C. Corp of the second part, and Charles

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Henry Clark of the third part, which recites that the party of the first part is seized and possessed of certain real and personal property; that she is about to marry the party of the third part; that it is the true intent and meaning of the agreement that all of her said property should be vested in trust for her sole and separate use and benefit during her life, free from any restraints, disabilities or liabilities of coverture. To this end she conveyed and assigned to the parties of the second part and the survivor of them all her property as aforesaid, upon the trusts therein mentioned, to collect the rents and income thereof, and after deducting therefrom certain payments and expenditures, to apply the balance thereof from time to time to and for her use, support and maintenance during her life. The parties of the second part, as such trustees, were given full power to sell and transfer the property in their discretion, and reinvest the proceeds thereof upon the same trust. The agreement further provided that, in case of her death after the solemnization of the contemplated marriage, leaving the party of the third part her surviving, the trustees were to convey and transfer the trust estate, or so much thereof as might then be held or possessed, to such person or persons and in such way and manner as she by will, or instrument in writing in the nature of a will, should devise, limit or appoint, which right is expressly reserved. In default of such devise or appointment, the trustees were directed to pay and deliver to the party of the third part absolutely one-half of her personal estate and the interest and income thereon; the other one-half thereof to be paid and delivered to such person or persons, and in the same manner as the same would have descended if she had been a *femme sole* and had died intestate. In the event above stated one-half of the net rents and income of the real estate were to be applied to the use of the party of the third part during his natural life, the other one-half thereof to the use of such person or persons as would be the right heirs of the party of the first part if she were a *femme sole* and had died intestate; and upon the death

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of said party of the third part to convey, transfer and make over, in like manner as last stated, the real estate and the proceeds and income thereof. It was in the agreement further provided that if the party thereto of the first part should survive the party of the third part, and fail to devise or limit the trust estate, then upon her death the same should be conveyed and made over to such person or persons, and in the same manner, shares and proportions, as the said estate would have descended if such agreement had not been made. The parties to the agreement bound themselves by mutual covenants to fulfill the trusts therein created.

The plaintiff intermarried with the party of the third part November 3, 1857, who died March 20, 1862, leaving issue of such marriage William G. Clark, now living and of full age.

Thereafter and on June 5, 1865, the plaintiff intermarried with the defendant Paul L. Thebaud, of which marriage there is issue Paul G. Thebaud, now living and a minor.

James T. Guibert, one of the trustees, died March 11, 1868, and thereafter John C. Corp, the surviving trustee, continued in possession of the trust estate until March 28, 1872, when he reconveyed the same to the plaintiff. This was done in pursuance of a written request of the plaintiff, accompanied by a certificate of a justice of the supreme court according to the provision of an act of the legislature passed April 11, 1849 (*Session Laws, 1849, chap. 375*).

If the trust had been limited to the life of the party of the third part it might well be claimed that the purpose for which it was created had ceased. But the settler saw fit to make provision for a subsequent event — that of her survivorship — and thus expressly continued the trust as to the property in question. In such case the estate, upon her failure to devise or limit it, was to be conveyed and made over to such person or persons and in the same manner, shares and proportions, as the same would have descended if such agreement had not been made.

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It has been held since the Revised Statutes took effect, that where lands have been conveyed to trustees to receive the rents and pay them over to a married woman for her sole use during her life, the trustees were vested with both the legal and equitable estate, subject only to the execution of the trust (*Noyes agt. Blakeman*, 6 *N. Y.*, 567). In that case the right of appointment by devise was also reserved, but the court refused to sustain a lien upon the interest of the *cestui que trust* or in the future income.

At this period of our jurisprudence it is unnecessary to examine in detail the disabilities of married women at common law. The attempt made to incorporate a remedy in the organic law of the state (constitutional convention, 1846) resulted in the enactment of statutes expressive of the popular will. Independent of the enabling acts of 1848 and 1849, the principle established by the case above mentioned is applicable to the issue herein involved. By her conveyance the plaintiff divested herself of all her estate in the property therein described. She could limit the remainder, but if she failed to make such limitation, her heirs at law or next of kin would, by her own direction, acquire a vested right in the property. She created an active trust, conferring the power of management and disposition of her estate upon her trustees (*Anderson agt. Mather*, 44 *N. Y.*, 249). Can she now recall it? Can her trustees evade it?

The case of *McWhorter agt. Agnew* (6 *Paige*, 111) involved a similar trust. The wife having survived the husband, the equitable estate being limited to her for life, it was held, by the operation of the rule in *Shelly's case*, that an unlimited power of appointing the inheritance by will united itself with the equitable estate in remainder to her heirs generally, so as to create in her an equitable estate in fee; that the legal estate having been united with such equitable fee by a conveyance from the trustee, the *cestui que trust* acquired an absolute title to the property. The trust thus decided to be extinguished was created in November, 1818, and the

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chancellor regarded the power of appointment by will reserved as appendant or appurtenant to the equitable estate. It was strongly intimated, however, that such ruling would not apply to a power in trust for the benefit of others who also have an interest in the execution thereof.

Under the provisions of the tripartite trust agreement and deed executed by plaintiff, her heirs-at-law and next of kin have at least a contingent interest in the property conveyed and assigned, and, moreover, the "rule in *Shelley's case*" was abrogated in 1830.

The Revised Statutes also made radical changes respecting trust estates. They enact that every person "who by grant, assignment or devise now is or hereafter shall be entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law and in equity, shall be deemed to have a legal estate therein" (*R. S., part 2, title 2, art. 2, chap. 1, sec. 47*). But the next section (48) declares that "the last preceding section shall not divest the estate of any trustee where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the lands which are the subject of the trust." The trust created by the plaintiff is one of a class which the revisers obviously did not intend to abolish, and for which provision is expressly made (*R. S., part 2, title 2, art. 2, chap. 1, sec. 55 [3]*).

In the case of *Douglas agt. Curger* (80 *N. Y.*, 15), the court of appeals refused to sanction the extinguishment of a trust somewhat analogous to the one under consideration. In the opinion per EARL, J., occurs the following language: "The supreme court has not the power to destroy a valid trust. The purpose of the statute was to make these trust estates and trust interests indestructible, and absolutely inalienable during the existence of the trust; and if they could be rendered alienable by the order of the court, the whole scheme of the statute would be greatly impaired and

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its purposes thwarted" (*See, also, Wright agt. Miller, 8 N. Y., 9.*)

It is claimed that authority for the extinguishment of this trust is to be derived from the act of April 11, 1849 (*Session Laws 1849, chap. 375*). The second section of this act provides that any person who may hold or may hereafter hold, as trustee for any married woman, any real or personal estate or other property, under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to her by deed or otherwise all or any portion of such property, or the rents, issues or profits thereof for her sole and separate use and benefit. The third section thereof provides that all contracts made between parties in contemplation of marriage shall remain in full force after such marriage takes effect.

The important question here is, what was the intention of the legislature in passing the act last named? Previous to the enabling acts of 1848 and 1849, trusts created by a woman contemplating marriage, or by other persons for her benefit, were sanctioned and even favored by the courts as a method of protecting a woman's property from her husband's creditors and of securing the income of it to herself independent of his control. The act of April 7, 1848 (*Laws 1848, chap. 200*) vested absolutely in a married woman the title of her property, real and personal, free and clear from any right or claim of her husband. The act of 1849 above quoted was a natural sequel to the prior act. The reason for the creation and continuance of such trusts has been obviated by the statute, and it was just and proper to authorize the trustees thereof to extinguish them by conveying the property held thereunder to the beneficiary in fee. I have not found any adjudged case in which the act of 1849 has been held applicable to a trust created by a beneficiary herself, and, in my judgment,

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it has no application to a trust of this character created by such beneficiary after the passage of such enabling acts. The legislation of 1848 freed her from her peculiar disabilities, and, if in face of this wholesome provision in her favor, a married woman deliberately creates a valid trust upon her property, it must be regarded as the act of any other person, and she must abide its consequences.

The trust, then, is still in existence, and upon it depends a contingent remainder which will vest upon the death of the *cestui que trust* if she fails to limit the right of succession. As the trustee had no legal power to extinguish the trust, the reconveyance of March 28, 1872, if effectual for any purpose, was impressed with it.

If this conclusion be correct, plaintiff has no status in an action for partition. She is neither a joint tenant nor tenant in common having an estate of inheritance or for life or for years in the premises in question (*Sec. 1532, Code Civ. Pro.*; *Brevoort agt. Brevoort*, 70 *N. Y.*, 136; *Jenkins agt. Fabry*, 73 *N. Y.*, 355).

N. Y. COMMON PLEAS.

JOSEPH H. BUDD, appellant, agt. HORACE THURBER *et al.*,
respondents.

Statute of frauds.—contract or promise not within the statute.

A., who was indebted to defendants, and was under business obligations to B. upon promissory notes made by the latter for his accommodation, executed a mortgage to B., in trust, to secure the payment of the accommodation notes, and also to secure payment of his indebtedness to defendants. Then B. transferred the mortgage, upon the latter's verbal agreement to become responsible for A.'s indebtedness to him upon the accommodation notes. The property mortgaged was subsequently bought in by defendants, and B., having had to pay the accommodation notes, assigned his claim under the mortgage to plaintiff, who brought this action to enforce it:

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Held, that the assignment by B. was a valid consideration for the oral promise, making defendants the debtors of B. and of plaintiff, as his assignee, and their promise to pay the notes is binding upon them.

General Term, June, 1881.

Before DALY, Ch. J.; VAN BRUNT and BEACH, JJ.

THIS is an appeal by the plaintiff from an order of the general term of the marine court affirming an order setting aside the verdict rendered herein in favor of the plaintiff, which order also dismisses the plaintiff's complaint, so the only remedy the plaintiff had was to appeal to this court, or the language of the order is as follows :

"This cause having come on for argument on the appeal taken herein, and after hearing Mr. Mitchell for the appellant and Mr. More for respondents, it appearing to the court that the verdict of the jury was not against the weight of evidence, but that the contract sued upon and proven on the trial was a verbal one, and within the statute of frauds, the mortgage assigned being a trust security and not property, we affirm the order only on that ground, otherwise the order should be reversed, and judgment on verdict of the jury reinstated.

"It is ordered that the order granting a new trial, and setting aside the judgment entered herein, be and the same hereby is affirmed on the questions of law involved, and that defendants have judgment against the plaintiff, dismissing his complaint."

The general term of the marine court expressly declare that the verdict was not against the weight of evidence, but so far as the questions of fact were concerned, the general term approves the verdict, thus presenting only questions of law to this court.

The action arose out of the following facts: It appears William Holcomb was a retail grocer, doing business in Jersey City, and had several accommodation notes of Gilbert

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D. Hancox, which were discounted at the bank; Holcomb also owed the firm of H. K. Thurber & Co. about \$800. Holcomb and his wife executed a mortgage of \$2,000 to Hancox. Hancox, on receiving the mortgage, executed and delivered back a writing, showing that the mortgage was given, first, to secure the payment of his accommodation notes which he had loaned to Holcomb; second, to secure the indebtedness to the Thurbers.

Some three or four months after this mortgage was executed Holcomb became insolvent, and his business, it appears, continued in his wife's name, and the indebtedness for which the mortgage was given was reduced to about \$1,400.

The Thurbers promised and agreed with Hancox, with the assent of Holcomb, that if Hancox would assign and transfer the \$2,000 mortgage to them they would take up and pay his said accommodation notes that had been discounted in the bank by Holcomb, and the mortgage was to be security in their hands for the old debt, and also to secure them for the debts contracted or to be contracted by Holcomb's wife to the full extent of the mortgage (Holcomb's wife having commenced to trade with the Thurbers at that time).

Hancox, in consideration of these promises, duly assigned the said mortgage to the Thurbers.

One of Hancox's said notes, \$350, was never paid by the Thurbers. Hancox assigned his claim against the Thurbers to the plaintiff.

The action is brought for the failure of the Thurbers to pay the said \$350 note, according to their promise, and interest thereon.

The defendants raised the statute of frauds, claiming that the promise is within the statute.

It appears that this \$2,000 mortgage was a second mortgage, there being a prior one of \$3,000.

The defendants themselves valued this property at \$4,500.

The simple question in the case is, have the Thurbers paid for this mortgage? Have they carried out the promise they

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made, in consideration of which it was transferred to them? If they have not, are they not bound to do so? Can a party buy a piece of property and, in consideration therefor, verbally agree that he will pay the seller's note in the hands of a third party running to maturity, and then, after getting the property into his hands, say to the vendor: "I will not pay your notes, because my promise to you to pay them involved also the payment of another person's indebtedness?" The Thurbers have obtained and enjoy the mortgage and all interest Hancox had in it; not only the mortgage, but the property itself.

P. & D. Mitchell, for appellants.

I. It has been repeatedly held in similar cases that the buyer's promise is an original one, and that he cannot avoid his own debt, because it incidentally discharges that of another. The case could be sustained under several of the rules often repeated by the authorities, which declare cases not within the statute. It is sufficient, however, to put the case under one of the most familiar rules, and one which Throop, in his *Treatise on Verbal Agreements*, mentions as "rule eighth" (*page* 565), following which he mentions a large number of cases, both English and American, sustaining the rule. The following is the rule as he there cites it: "A promise to pay the debt of another is not within the statute, if its consideration was the abandonment to the promisor of a security for the payment of the debt consisting of a lien upon, or interest in property to which the promisor then had a subordinate title." Whatever may be said about the wording of this rule—for it certainly is more complex than that of chancellor KENT in *Leonard agt. Vredenburg* (8 *Johns.* 29), where he classifies it as the third rule—no one can doubt but that a case fitting all the conditions as thus expressed by Throop, is clearly not within the statute. This case certainly fits all the conditions thus expressed by him, for the Thurbers, the promisors, say to Hancox, the promisee,

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"assign this mortgage to us and we will pay and cancel your notes in the bank." Both the promisors and the promisee had interests in the mortgage — that of the promisors subordinate to that of the promisee. The consideration of the promise was the abandonment and transfer to the promisor of a security for the payment of the debt consisting of a lien upon property to which the promisors had a subordinate lien. The rule is more simply expressed by chancellor KENT, and has always been recognized and sustained in this state. It reads: "When the promise to pay the debt of another arises out of some new and original consideration or benefit of harm moving between the newly contracting parties." Chief justice COMSTOCK in *Mallory agt. Gillett* (21 N. Y., 419), in commenting upon this rule, cites from chief justice SAVAGE with approval his wording of the rule, which is as follows: "In all these cases, founded on a new and original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery."

II. The case should not be confounded with those where the considerations move not to the promisor, but moves to the original debtor, which belong to an entirely different class of cases, and that was the case with *Mallory agt. Gillett*; there the plaintiff relinquished his interest in the canal boat — not to the defendant but to the original debtor — and the court held the agreement between the plaintiff and defendant in that case was collateral, because it was not sustained by a consideration moving between the plaintiff and defendant. The court in *Mallory agt. Gillett* cites a number of cases, showing that where such an agreement is sustained by a consideration moving between the promisor and the promisee, it is an original undertaking and not within the statute. The court further on says: "*Farley agt. Cleveland* (4 Cow., 432, and *S. C. in error*, 9 Cow., 639), already mentioned, was entirely similar. The plaintiff held the note of one Moon,

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which the defendant promised to pay in consideration of fifteen tons of hay sold to him by Moon. The promise was held to be not within the statute. The reporter's note truly expresses the principle of the decision. It is as follows: 'Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor or harm to the promisee, moving to the promisor, either from the promisee or the original debtor, such promise is not within the statute of frauds, although the original debt still subsists and remains entirely unaffected by the new agreement.''' By some commentators there is a disposition to ignore rules on this subject, but no one can deny that the authoritative cases in this state have established rules that have long been followed. And thus the whole subject is simplified. The reason for the rule that we contend governs this case is, that the promise is original; and the paying of another's debt is but a circumstance, or rather an incident to the original promise. So it is error in the case at bar, to consider Thurber's promise to Hancox, as a promise to pay the debt of Halcomb. It is simply a promise on the part of the Thurbers to pay to Hancox a debt due to him in consideration of his assigning to the Thurbers a mortgage for \$2,000. We sue the Thurbers on their own indebtedness. A simple statement of the case shows that there is no escape from the conclusion that the promise of the Thurbers is an original undertaking, and their failure to fulfill the same leaves their debt unpaid. Hancox held in his name a \$2,000 mortgage, to secure, in the first place, whatever claims he might have against Holcomb, the mortgagor, on account of accommodation notes that Hancox had given to Holcomb, which were discounted at the bank, and then running to maturity. The only interest the Thurbers had in it was an equitable right to receive from Hancox whatever was left after he had fully reimbursed himself, for whatever payments he might have made on his own notes which were discounted at the bank for the accommodation of the mortgagor. The Thurbers, as prudent business

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men, wanted this \$2,000 mortgage, they wanted both the legal and the equitable title in their name and under their control. The consideration for was, first, the amount of money they would pay out in taking up Hancox's notes in the bank; second, the \$800 then due by Holcomb to the Thurbers and, third, the \$600 the further credit that the Thurbers were about to give to Mrs. Holcomb. The cases cited by the other side bear out the principle contended for. *Prime agt. Koeller* (77 *N. Y.*, 91) is a case directly in favor of the plaintiff. For there was a verbal promise to pay the debt of another arising out of an original undertaking between the promisor and promisee. The defendant in that case would not have been held liable to pay the two installments of interest, were it not for his verbal promise to pay the same on condition that the defendant would not foreclose the mortgage, which the defendant agreed to. Thus the defendant being the owner of the land received a benefit from the agreement, in that no proceedings were taken to disturb his possession of the land. The court says, page 94: "The circumstances bring the case directly with the third class of cases enumerated in *Leonard agt. Vredenburg* (8 *J. T.*, 28), viz.: Where the promise to pay the debt of another arises out of the same, new and original consideration of benefit or harm running between the newly contracting parties. In this class of cases the subsisting liability of the original debtor is no objection to a recovery." The language in the first part of the opinion may at first glance appear a little deceiving, but it is to meet the statute, and in its broad sense it is correct, and refers only to collateral undertakings to pay the debt of another. But the courts distinguish between that class of cases where the promise is merely collateral, and those where the paying of another's debt is a part performance of a new and original undertaking between the promisor and the promisee as will be seen further on in the opinion and the entire case itself. The case of *Belknap agt. Bender* (75 *N. Y.*, 446), has no bearing one way or the other with this case. There the court dis-

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tinely held that there was no consideration moving to the defendant from the plaintiff. It says: "The promise of the plaintiff to work for the defendant at what appeared to be a full compensation did not furnish a consideration for the defendant's promise to pay Ward & McVicker's debt" (*Pfeffer agt. Adler*, 37 *N. Y.*, 164), and the trial judge so held. The court held, and it was impossible to have held otherwise, that the defendant held the property under the written agreement set forth, which of course was controlling. This left the defendant's promise without any consideration which would not have been valid even in writing. The following from *Cook agt. Moore* (8 *N. Y. W. Dig.*, 263), shows that the rule on which the plaintiff's case is based is well settled: "The county court erred in dismissing the complaint. The defendant undertook the payment for himself. This case is not within the statute of frauds, but rather falls within the third class of promises stated by Comstock, J., in *Mallory agt. Gillett* (21 *N. Y.*, 433), where, although the debt remains, the promise is founded upon a new consideration which moves to the promisor. This consideration may come from the debtor, as where he puts a fund in the hands of the promisor, either by absolute transfer or upon a trust to pay the debt" (*Lippincott agt. Ashfield*, 4 *Sand.*, 411). "From the facts proved in this case, the law would imply a liability to apply the fund in the defendant's hands in the manner directed, and in which he undertook to do (*Barker agt. Bucklin*, 2 *Denio*, 45; *Lawrence agt. Fox*, 20 *N. Y.*, 208; *Barlow agt. Myers*, 64 *N. Y.*, 41). Where the law will imply a debt or duty against any man, his express promise to pay the same debt or perform the same duty, must, in its nature be original (21 *N. Y.*, 430). Judgment reversed, and new trial ordered, with costs to abide the event."

E. More, for respondents.

BEACH, J. — In considering this case it is needful to keep in view the fact that the agreement of the defendants was

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not made with the holder of the Hancox note. Had it been, a question would have arisen, controlled by the provisions of the statute of frauds, which enacts that every special promise to answer for the debts of another shall be void, unless such agreement or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith. The case at bar is not affected by the enactment.

The action is not brought by the creditor (the holder of the unpaid note) upon a parol promise made to him by the defendants, to pay it, but by the assignee of Hancox, the debtor, with whom the contract was found by the jury to have been made.

The case in brief would seem thus: Hancox was primarily indebted to the holder upon the notes he had executed as maker for the accommodation of Holcomb, and held security for his indemnity. The defendants agreed, if he would assign to them this security, they would pay the paper whereon he was bound. He did so, and they failed to perform their part of the contract. This engagement was certainly made upon sufficient consideration, to wit, the possession and control of the mortgage and bond then assigned to them.

Had an action been brought by the bank as holder of the paper against the defendants, a recovery would have been had under the principle "that when one person for a valuable consideration engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement" (*Schermerhorn* agt. *Vanderheyden*, 1 *Johns. R.*, 140; *The Del. & Hud. Canal Co.* agt. *The Westchester County Bank*, 4 *Den.*, 97; *Brewery* agt. *Dyer*, 7 *Cush.*, 337; *Lawrence* agt. *Fay*, 20 *N. Y. R.*, 268; *Huber* agt. *Ely*, 45 *Barb.*, 169; *Wyman* agt. *Smith*, 4 *N. Y. Superior Court R.*, 331; *May* agt. *The National Bank of Malone*, 16 *Sup. Ct. R.*, 108).

The holder of the notes being thus able to avail himself of the defendant's agreement, I see no reason why Hancox, with

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whom the agreement was made, should not, especially so, he having paid the note. The plaintiff here, by assignment, succeeds to his rights (*Clafin agt. Ostrom*, 54 *N. Y. R.*, 581).

The facts in the above case were as follows: Hanford and Charles Ostrom were partners, and indebted to the plaintiff. On the dissolution of the firm by written agreement, Hanford assigned all interest to his partner, and the latter agreed to pay plaintiff's debt among others. The defendant executed to Hanford a written guaranty that Charles Ostrom would perform all his covenants in the agreement. The plaintiff's debt being unpaid, they took an assignment of all Hanford's interest in and claim under the agreement and guaranty.

In sustaining a judgment for plaintiffs, the court say: "So too, Charles Ostrom having failed to pay the plaintiff's debt, committed a breach of his covenant with Hanford, which gave the latter a cause of action against him, and also against the defendant, his surety, and this cause of action he assigned to the plaintiff."

It appears from the record that the premises covered by the mortgage, assigned by Hancox to the defendants, are now owned by them, although by what proceeding obtained is not clearly disclosed by the proofs. Under these circumstances it would be manifestly inequitable to relieve them from the performance of their promise.

The order must be reversed with costs.

Williams agt. Western Union Telegraph Company.

N. Y. SUPERIOR COURT.

WILLIAM S. WILLIAMS agt. THE WESTERN UNION TELEGRAPH
COMPANY and others.

Corporations — Stock companies — their right to issue stock for their surplus earnings — Such issuing not prohibited by the laws of this state — Injunction — When increase of capital stock not against public policy — What is not deemed a watering of stock of a corporation — Telegraph companies.

Although the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares, yet such market value also embraces other essential elements. It is the estimate put on the potentiality of a corporation to avail itself profitably of its franchise, on its capacity and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value.

The difference between the actual value and the sum paid by the Western Union Telegraph Company for the property of the American Union and the Atlantic and Pacific Telegraph Company (if any) is not so great as to authorize finding that the agreement was fraudulent and therefore should be set aside on that ground alone.

A corporation organized under the laws of the state of New York is authorized by these laws to issue scrip dividend to represent its surplus earnings.

The action of the Western Union Telegraph Company in issuing certificates of stock to the amount of \$15,526,590 is not prohibited by the statute (2 R. S. [6th ed.], 398).

The meaning of the words "capital stock" as used in this statute means the property and franchises of the company, and the statute itself means that no corporation shall divide among its shareholders any portion of "the property and franchises of the company."

The capital stock of a corporation mentioned in its charter is not *per se* a limitation of the amount of property, either real or personal, which it may own. It may divide its profits among the stockholders at such times and to such amounts as the directors may deem expedient. Instead of dividing the profits, they may, in their discretion, permit the surplus of property to accumulate beyond their original capital, as the interest of the corporation shall appear to dictate; and the corporation has, in the manner provided by law, a right to increase the number of certificates which represent the interest its stockholders have in its corporate fund. Such transaction is neither in law nor in fact a watering of the stock of a corporation.

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Chapter 399 of the Laws of 1875 provides the manner in which a company organized under the laws providing for the incorporation of telegraph companies can increase the number of shares of its capital stock:

Held, that the Western Union Telegraph Company has complied with the requirements of this law. It has published the notice as required, and has obtained the written consent of the shareholders owning and holding three-fourths in amount of its capital stock.

Held, also, that this increase of capital stock, authorized as it is by the laws of this state, is not against public policy, because the law-making power of the state has allowed it.

Special Term, June, 1881.

TRUAX, J. — I have found, as a matter of fact, that the defendants Jay Gould, Russel Sage and Thomas T. Eckert did not enter into an unlawful combination or agreement with divers persons connected with the Atlantic and Pacific Telegraph Company, the Western Union Telegraph Company and with the American Union Telegraph Company for the purpose of uniting together large amounts of capital and for the purpose of depressing the stocks of the several telegraph companies in the market, in order that they might get control of the then companies after the holders of the stock of said companies had been frightened into the belief that a “telegraph war” was impending, and had sold their stock. I have also found that the other allegations of fraud and conspiracy made in the complaint against the said defendants and others were not proved on the trial. One of the very able counsel for the plaintiff, in his argument at the close of the trial of this case, said that he was not going to lament the fact that he had failed to show such a combination — that he had not been able to prove certain things by the defendant.

I have also found that the property of the American Union was worth \$15,000,000 and that of the Atlantic and Pacific \$8,400,000. The plaintiff alleges in his complaint that the real value of the property of these two companies does not exceed the sum of \$8,000,000, and to prove that allegation called,

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among others, Mr. Eckert, Dr. Green, Mr. Bates, Mr. Shivler, Mr. Van Horne, Mr. Sanford and Mr. Shaffner. Mr. Shaffner could not say whether he was or was not an expert in determining the cost of the construction of telegraph lines, but said he could tell pretty well what a line would cost if he knew the market price of the materials. I have endeavored to ascertain from his testimony what the value of the property of the American Union was, and I have come to the conclusion that this witness would have fixed the value, if he had named it, at about four to six millions of dollars. Mr. Sanford thought the poles and wires could be put up for \$7,000,000, while Gen. Eckert testified that on the 19th day of January, 1881, it would have cost about \$10,000,000 "to build a set of telegraph lines, plant and other appurtenances to the telegraph business of the extent and capacity of those possessed by the American Union and sold to the Western Union;" and that now it would cost more because materials and labor are higher. In this he is corroborated by Mr. Shivler. Gen. Eckert said that he considered the property of the American Union to be worth \$20,000,000, and that he estimated its value from the earning capacity of the property. Besides this, the American Union had a great many valuable contracts with said roads, which it would have been impossible, in January, 1881, to replace or reproduce.

In the case of the *Commonwealth* agt. *The Hamilton Manufacturing Company* (12 *Allen*, 302) chief justice BIGELOW says: "Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares, but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality

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of a corporation to avail itself profitably of its franchise, on its capacity and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value."

I think the evidence warrants the conclusion that the property of these two companies was worth the sum paid for it by the Western Union. At any rate, the difference between the actual value and the sum paid — the inadequacy of price was not so great that I would be authorized in finding that the agreement was fraudulent, and, therefore, should be set aside on that ground alone (2 *Kent's Com.*, 477; 1 *Parsons on Cont.*, 492, and cases there cited).

I have also found that the scrip dividend of \$15,526,590 represents surplus earnings of the Western Union Telegraph Company, made since the 1st day of July, 1866, which had, by and with the consent of the stockholders of said company, been invested, from time to time, in property necessary and useful in and about the business of said company; that said property was in the possession of the company on the 19th day of January, 1881, and that said property was then worth the sum of \$15,526,590.

The question then arises, upon these findings: Is a corporation organized under the laws of the State of New York, authorized by these laws to issue scrip dividends to represent its surplus earnings, which have from time to time been used to purchase new plant — or rather, is it prohibited by the laws of the State of New York from so doing?

I have held, as a matter of law, that the laws of the State of New York do authorize the Western Union Telegraph Company to issue stock for this \$15,526,590 surplus earnings. The plaintiff contends that such issuing of stock is prohibited by the laws of this State, and calls the attention of the court to the following portion of the Revised Statutes: "It shall not be lawful for the directors or managers of any incorporated company in this State to make dividends excepting from the surplus profits arising from the business of such

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corporation ; and it shall not be lawful for the directors of any such company to divide, withdraw or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the capital stock without the consent of the legislature" (2 *Rev. Stat.* [6th ed.], 308).

If the defendant, the Western Union Telegraph Company, has divided any portion of its capital stock among its stockholders, it comes within the statute, and the plaintiff is entitled to maintain the injunction already issued.

What is the meaning of the words "capital stock" in the statute above cited? The capital stock is not only the money put into the corporate fund ; it is also the property put into that fund. It is to be distinguished from the certificates issued by the corporation usually called stock certificates, which are simply the written evidence of the holder's right to participate in the surplus profits of the corporation during its existence, in the proportion that the shares held by him bear to the whole number of shares into which the corporate property is divided ; and on the dissolution of the corporation to participate in the same proportion in the division of the corporate property, after the payment of the debts of the corporation (*Hyatt agt. Allen*, 55 *N. Y.*, 553 ; *Jones agt. Terre Haute R. R. Co.*, 57 *N. Y.*, 196 ; *Burrall agt. Bushwick R. R. Co.*, 75 *N. Y.*, 216 ; *Pierce on Railroads* [2 ed.], 110).

A holder of such a certificate acquires no right to take away any portion of the corporate property (75 *N. Y.*, 216). The corporate property — the "capital stock" of a corporation — is not divided or withdrawn or reduced by the issuing of such certificates. The corporate fund — the capital stock — still remains the same. "The word stock," said the court of appeals, in *Burr agt. Wilcox* (22 *N. Y.*, 551), "has various significations, but as applied to joint-stock associations it means the property and franchises of the company. It is sometimes used to designate the certificate or scrip issued to the stockholder ; but this is an inappropriate use of the word. The scrip is not the stock."

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I am of the opinion that the statute means that no corporation shall divide among its shareholders any portion of "the property and franchises of the company," and that the action of the defendant — the Western Union Telegraph Company — in issuing the said \$15,526,590 of certificates of stock, of which action the plaintiff complains, is not prohibited by the statute above quoted.

The defendant contends that the increase of the capital stock of the Western Union to \$80,000,000 was authorized by chapter 319 of the Laws of 1875. The plaintiff contends that when under that act an addition is made to the capital it must be paid for, and that unless legislative authority is given to issue stock for a consideration other than money, it must be paid for in money or money's worth. I have held, as matter of fact, that this \$15,526,590 of stock was issued for a valuable consideration, and that it had been paid for with \$15,526,590 of property. It is the law in this state that in the absence of any statutory restriction a corporation has power to waive payment otherwise than in money for subscription to the capital stock (*East N. Y., &c., R. R. Co. agt. Lighthull*, 5 *Abb. [N. S.]*, 458).

This is one of the common-law powers of a corporation. "Such common-law powers," said the general term of this court in the case cited above, "are the same as those possessed by individuals, unless restricted by some pointed or clearly implied prohibition of law" (*Barry agt. Merchants' Exchange Co.*, 1 *Sandf. Ch.*, 580; *De Graff agt. Am. Linen Thread Co.*, 21 *N. Y.*, 124).

And the objection that an act of corporation is *ultra vires* rests upon the absence of either express or implied power, and not upon the wrong use of it. In the case of *Barry agt. Merchants' Exchange Company*, it was held that the capital stock of a corporation mentioned in its charter is not *per se* a limitation of the amount of property, either real or personal, which it may own. It may divide its profits among the stockholders at such times and to such amount as the directors may deem expedient.

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Instead of dividing the profits they may, in their discretion, permit the surplus of property to accumulate beyond their original capital, as the interest of the corporation shall appear to dictate. It seems to me, then, that if a corporation has a right to allow its corporate fund, its capital stock, to increase beyond the limit fixed for its capitalization by its charter, it has, in the manner provided by law, a right to increase the number of certificates which represent the interest its stockholders have in its corporate fund. I do not mean to be understood as saying that a corporation has a legal right to issue certificates of stock beyond the value of its corporate property — in other words, that a corporation has a right to “water” its stock. I do not pass upon that question. I have held, as matter of fact, that the Western Union Telegraph Company has not watered its stock. It was proved on the trial of this action that money earned by the said company, and which was the profits of the business of the company, and as such was available for the purpose of dividends, had been used by the company in purchasing new permanent assets for which no stock had been issued. It is not an unusual thing for corporations to allow a surplus to accumulate and to be held by the corporation either in money or other property until, in course of time, certificates of capital stock are issued to the stockholders to represent their interest in these accumulations. Such a transaction is neither in law nor in fact a watering of the stock of a corporation. For the certificates of stock the corporation holds either the money or the property to the full amount of the certificates issued, and it falls neither within the spirit nor the letter of the law, if there be such a law, against the inflation of the capital stock of a corporation like the Western Union Company. The true test of the transaction is, has the money of the stockholders, to the amount represented by the proposed issue of certificates, been retained, and is it held by the company, either in money or in property? If so, it is proper that the interest of the stockholder in such accumulation should be represented in his hand by

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certificates of stock. Courts have frequently been called upon to determine whether such accumulations belong, when they come to be divided, to the stockholders of record at the time the accumulations were made, or to the stockholders at the time of making the division. It is now well settled that a shareholder in a corporation has no legal title to its accumulated profits until they are divided, and when divided they go to their shareholders (*Hyatt agt. Allen*, 55 *N. Y.*, 553; *Jones agt. The Terre Haute R. R. Co.*, 57 *N. Y.*, 196).

Incident to the ownership of stock in a corporation, and passing with the assignment of shares thereof, is the right to receive the proportional share of all the profits not divided at the time of the purchase of the shares, and it is immaterial at what time and from what sources these profits have been earned.

I have therefore reached the conclusion that the proposed issue of new stock, upon the evidence in this case, does not come within the spirit or the letter of the law against watering stocks, if there be such a law. Within the past quarter of a century a great many corporations have watered their stock, and such transactions have frequently been before the courts of this and other states; and the able counsel for the plaintiff have not found any case in which the court has, in express terms, expressed its disapproval of such a transaction. There are, on the other hand, cases in which the courts have approved "the issue of dividends of stock where there were not earnings properly applicable for the purposes of a dividend in cash, and it was deemed expedient to retain the amount in order to make permanent improvements or to pay debts." I quote the language of Pierce on the Law of Railroads (*page* 123), a recognized authority. The question was also decided by a judge of the supreme court of this state in *Howell agt. Chicago and N. W. R. R. Co.* (51 *Barb.*, 378).

There are also numerous cases in which the question has been collaterally before the courts, and in no instance have the courts denied the right of corporations to issue an increased amount of stock to represent accumulations. Dividends of

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stock have been issued to pay interest on stock (*Ohio City agt. Cleveland and T. R. Co.*, 6 *Ohio St.*, 489). "Whatever disposition was made" (of such a distribution of stock) said the general term of the supreme court in *Miller agt. Illinois Cent. R. R. Co.* (24 *Barb.*, 331), "whatever disposition was made of it the stockholders get the benefit of it directly or indirectly" (*See, also, Jones agt. The Terre Haute R. R. Co.*, 57 *N. Y.*, 196; *State agt. Baltimore and Ohio R. R. Co.*, 6 *Gill*, 363; *Boston and L. R. R. Co. agt. Commonwealth*, 100 *Mass.*, 399).

Chapter 399 of the Laws of 1875 provides the manner in which a company organized under the laws providing for the incorporation of telegraph companies can increase the number of shares of its capital stock. It says: "It shall be lawful for any association of persons organized under this act, by their articles of association to provide for an increase of their capital, and the number of shares of the capital stock of the association; but if any such association shall have omitted to so provide for an increase of their capital, it shall be lawful, after notice of the intention so to do, published once a week for six weeks successively in the state paper, and in any newspaper of general circulation published in the county where the principal office of such company is located, and with the written consent of shareholders holding and owning three-fourths in amount of the then capital to provide for an increase thereof and the number of shares into which the same shall be divided." The articles of association of the Western Union Telegraph Company, although they were before chief judge SEDGWICK and judge SPEIR, were not offered in evidence on the trial of this action. In the absence of evidence to the contrary a corporation will be presumed to have acted in conformity with its corporate powers (*Chautauqua County Bank agt. Risley*, 19 *N. Y.*, 369; *De Graff agt. American Linen Thread Co.*, 21 *N. Y.*, 124).

The Western Union Telegraph Company has complied with the requirements of this law. It has published the notice as required, and has obtained the written consent of the share-

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holders owning and holding three-fourths in amount of its capital stock.

I am also of the opinion that this increase of capital stock, authorized, as it is, by the laws of this state, is not against public policy. It may be against the public good but it cannot be against the public policy, or, as it is sometimes called, the policy of the law, because the law-making power of the state has allowed it. Courts, since the time of Henry V, have held that contracts in restraint of trade are against public policy. Such contracts are neither expressly nor impliedly authorized by statute, yet if the legislature should declare that hereafter no such contract should be considered to be against public policy, such a contract would not be against public policy. It is within the power of the legislature to say what is and what is not against public policy, and having said it, it is the duty of the courts "to declare the law and not to make law."

Holding as I do upon the main question in this action, I do not consider it worth while to discuss whether the plaintiff is a "litigious volunteer," whether he is "making improper use of the process of the court," whether the fact that the agreement of January nineteen has been executed, or whether the plaintiff has acquiesced in the agreement is a defense to the action.

Judgment for the defendant is ordered, with costs.

N. Y. COMMON PLEAS.

JOHN F. WALLACE *et al.* executors, agt. MICHAEL FEELY *et al.*

Mortgage foreclosure — Sale — When two or more buildings may be sold in one parcel — Code of Civil Procedure, section 1678 — The word "must" in this section directory merely.

The word "must," in section 1678 of the Code of Civil Procedure, is directory merely, and a foreclosure sale of two buildings is not invalidated because they have been sold together.

The question whether a sale in one parcel is proper or not, is one that must be determined by the circumstances of each case.

Special Term, May, 1881.

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John Hayes, for plaintiff.

Turner Lee & McClure, for purchaser.

J. F. DALY, J.—The only important objection is that the premises were sold in one parcel. They consisted of four buildings situated on one corner city lot, no access to any one being obtained through any other. The Code of Civil Procedure (*sec.* 1678) provides that “if the property consists of two or more distinct buildings, farms or lots, they must be sold separately; except where two or more buildings are situated on the same city lot and access to one is obtained through the other they may be sold together.” The question is whether this provision is directory merely, as the provisions of the former statute regulating judicial sales (2 *R. S.*, 326) were held to be (*Cunningham agt. Cassidy*, 17 N. Y., 276). That statute enacted that if the premises consist of distinct buildings they shall be sold separately. The reason of the codifiers for substituting must for shall is not apparent; they give no explanation in their note to the section. The substituted word is more imperative than that which it replaces. As verbal alterations occur frequently in the new Code without apparent reason, the change in question loses much of its significance.

The reasons for holding the former enactment to be directory merely are applicable in every respect to the new. No different construction could be adopted without doing in certain cases great injury. Here it is conclusively shown that if the separate buildings on this lot had been separately sold the aggregate price brought would be from \$5,000 to \$7,000 less than what was actually obtained at the sale in one parcel. The question whether a sale in one parcel is proper or not is one that must be determined by the circumstances of each case.

The death of the mortgagor and owner of the equity of redemption since the sale, leaving infant children who are not

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represented on this motion, does not present any difficulty in determining whether the purchaser is or is not bound to take title. Up to this time no objection to the mode of sale has been made on behalf of the deceased, or on behalf of his children. As he had notice of the proceedings, and was chargeable with notice of the manner of sale and acquiesced in it, he would be estopped from objecting afterwards, and his heirs are through him equally estopped by his acquiescence.

A bargain and sale deed from John F. Wallace will vest his interest in the purchaser.

The stipulation of the attorneys for the defendant James Flannagan cures the defect in the service of the notice of application for judgment, &c.

Application denied, without costs.

COURT OF APPEALS.

THE STEUBEN COUNTY BANK, respondent, agt. JOHN L. ALBERGER and others, and LOUISA F. ALBERGER, appellants.

Attachment — Decision of a motion to vacate, founded upon a judgment and execution is no bar to a second motion to vacate, founded upon the party's right as grantee under a deed — Res adjudicata — how far it applies to decisions on motions.

Where a motion was made by A., founded upon her judgment and execution, to vacate the attachment on the ground of the insufficiency of the proofs upon which it was granted, which was denied on the ground that the judgment was irregular, and that she did not acquire a lien upon the attached property, and, therefore, could not make the motion, A. then made a new motion to vacate the same attachment, alleging that she had a deed of the attached real estate, made upon the same day her judgment was rendered, and that when she made the former motion she supposed her judgment was a lien upon the land. She had previously applied to the special term for leave to renew the former motion, for the same reason, and leave was refused :

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Held, that the present motion not being founded upon her right as lienor, to move to vacate the attachment, but upon her right as grantee under a deed, was not in the nature of an application to review the question decided on the first motion and the decision on that motion, that she was not a lienor under her judgment and execution, was in no way inconsistent with a new motion founded upon her ownership of the land attached.

The fact that she might, on the first motion, have proceeded on this ground also, did not preclude her from resorting to an independent motion to vacate, after the first motion was denied.

The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision of the former motion, cannot apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion. The decision of the former motion is no bar to this motion.

The doctrine of *res adjudicata* does not apply with the same strictness to decisions on motions as to judgments :

Held, that the order of the general and special term should be reversed, and an order entered vacating the attachment as against the land embraced in the deed (*Modifying decision in same case*, 78 N. Y., 252).

January, 1881.

ON the 29th day of November, 1877, the county judge of Steuben county granted an attachment in this action against the property of the defendants Alberger, upon affidavits tending to show that they were about to transfer their joint and individual property to defraud plaintiff, which ground was duly recited in the warrant. On the following day the sheriff of Niagara county seized a large amount of real and personal property of the defendant Samuel F. Alberger, under this attachment, and still holds the real estate thereunder. On the 4th day of December, 1877, this plaintiff recovered judgment in this action against the defendants Alberger for \$14,087.23, which was docketed in Erie and Niagara counties the same day, and on the same day executions thereon were issued and delivered to the sheriffs of Erie and Niagara counties for service. Louisa F. Alberger thereupon moved at special term, in February, 1878, to vacate said

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attachment for alleged insufficiency of the papers upon which the same was granted, and set forth in her moving affidavit that she had acquired a lien upon the attached real and personal property subsequent to the levying of the attachment by virtue of a judgment and execution in her favor against said Samuel F. Alberger. When this motion came on to be heard, the plaintiff was permitted to use additional affidavits to sustain the attachment, and the motion was denied without passing upon the sufficiency of the original affidavits. The court of appeals reversed this order for error in admitting the additional affidavits, and remitted the motion to special term for reargument, and the motion was duly brought on for argument at the December special term, 1878 (55 *How.*, 481). The special term again denied the motion on the ground, that the judgment of Mrs. Alberger was irregular, and that she did not acquire a lien upon the attached property, and, therefore, could not make the motion. Upon appeal from this order, the general term affirmed it on the ground, that the papers upon which the attachment was granted, were sufficient to sustain the same. The court of appeals held that the original affidavits were not sufficient as against S. F. Alberger, and reversed both orders and vacated the attachment as to property of Samuel F. Alberger. Before the entry of this order, however, a motion for reargument was made in the court of appeals, and the decision, last mentioned, was so modified as to vacate the attachment as to lien only which Mrs. Alberger acquired upon the attached property under her judgment and execution, and leaving the attachment unaffected as to all other property of Samuel F. Alberger which was attached. The attachment was, therefore, by this order of the court of appeals, vacated as to a part of the property mentioned in the motion affidavit, and left in force as to the residue. Mrs. Alberger then made a new motion at special term, to vacate the same attachment, alleging that she had a deed of the attached real estate, made upon the same day her judgment was rendered, and that when she made the

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former motion, she supposed her judgment was a lien upon the land. She had previously applied to the special term for leave to renew the former motion, for the same reason, and leave was refused. She now claims she can make the motion as a matter of right, without obtaining leave to renew, and notwithstanding the fact that an application for leave to renew has been denied. The special term denied her present motion, on the ground that the former motion was a bar, and that the motion could not be made without leave of the court. The general term, at the April term, 1880, affirmed the order, and from that order this appeal is taken by Mrs. Alberger.

J. F. Parkhurst, for plaintiff, respondent.

I. The order is not appealable because it was discretionary and does not affect a substantial right within the meaning of the Code. This court has decided that at the time Mrs. Alberger made her first motion to vacate this attachment, she had a full and complete remedy by which she might have vacated the attachment in one motion as to all the attached property in which she claimed an interest. She had title to the land, an execution lien upon the personal property, and claimed to have also a judgment lien upon the attached real estate. There were two parcels of land and various articles of personal property, all in the custody of the sheriff, under plaintiff's attachment. Instead of embodying all her claims and objections in one motion, she made a motion which, as it now appears, was for a part of the property only, and now claims a strict legal right to make a new motion to vacate the attachment, as to the balance of the property, without leave of the court. It is very plain that if she had the right to make two motions, she had just as good a right to make twenty or an hundred motions to vacate the attachment. The question, therefore, presented to the supreme court was, whether a party having a plain and adequate remedy, by one motion, to obtain all the relief to which she was entitled, had a strict legal right to make an infinite subdivision of her

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remedy without leave of the court, and in defiance of its order. The sufficiency of the affidavits, or the right of Mrs. Alberger to vacate the attachment, was not the real question then before the court. The real question was whether she might do it by a multitude or succession of motions instead of doing it by one. It was purely a question of procedure in the supreme court. In this view it cannot be doubted that the supreme court had the right to grant or refuse her this privilege, in its discretion. If otherwise, the supreme court would be entirely at the mercy of its suitors, in such a case, and powerless to prevent a multitude of motions for relief when one motion would serve the same purpose. That court has always exercised, without question, the right to allow or refuse, in its discretion, the privilege of renewing a motion once denied, and without any reference whatever to the merits of the original motion (*Mianney agt. Blogg*, 41 *N. Y.*, 521), and such an order is not appealable. This order was made then in the exercise of the legal discretion of the supreme court as to procedure therein, and is not appealable (*Selden agt. Del. and Hud. Canal Co.*, 29 *N. Y.*, 634; *In matter of Reeve*, 34 *N. Y.*, 359; *Tanton agt. Groh*, 8 *Abb. Pr. [N. S.]*, 385; *King agt. Merchants' Exchange Co.*, 5 *N. Y.*, 547; *Hoe agt. Sanborn*, 36 *N. Y.*, 93; *Fort agt. Bard.*, 1 *N. Y.* —; 43 *id.*, 426; *Id.*, 125; *Thomas agt. Fleury*, 26 *N. Y.*, 26; *Carpenter agt. Haynes*, 1 *Cod. R. [N. S.]*, 414; see also *German Am. Bank agt. Morris Run Coal Co.*, 74 *N. Y.*, 60; *People agt. N. Y. C. R. R. Co.*, 29 *N. Y.*, 418; *Martin agt. Windsor Hotel Co.*, 53 *How.*, 422; *Howell agt. Mills*, 53 *N. Y.*, 322; *Hasbrouck agt. Kingston Board of Health*, 3 *Keyes*, 483). But it also follows from this that the order does not affect a "substantial right," and for that reason is not appealable.

II. The former motion made by Mrs. Alberger, to vacate this attachment, was for the same relief asked upon this motion, and is a bar to this motion. The moving affidavit of Mrs. Alberger, upon the former motion, alleged a lien under

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her judgment and execution upon the same property referred to in her affidavit upon this motion, and as a claimant of the same property she now seeks by a second motion to vacate the plaintiff's attachment as to the same property. We insist that section 682 contemplates but one motion by any creditor against an attachment. It cannot mean that a multitude of motions may be made. A creditor, who has a number of claims or liens which he has acquired upon the attached property, can make but one motion against the attachment, and he must rest that motion upon all his claims or liens. He cannot make a succession of motions for precisely the same relief against an attachment.

III. Such a motion cannot be made without leave of the court, and the decision of the special term in December, 1877, denying leave to renew the motion, is a bar. In the statement of this proposition, we have referred to this as a renewal of the former motion by Mrs. Alberger. It is for the same relief, and founded upon an alleged interest in the same property. The other motion was decided upon the merits, and cannot be renewed without leave of court, even upon fresh papers presenting further evidence (*Shultz agt. Rodwald*, 1 *Abb.* [*N. C.*], 365; *Bascom agt. Fealzer*, 2 *How.*, 16; *Ray agt. Connor*, 3 *Edw. Ch.*, 499). It is a well settled proposition that a motion once denied cannot be renewed as a matter of right, except upon a different state of facts arising subsequent to the decision of the former motion. *Bank of Havana agt. Moore*, 5 *Hun*, 624; *Belmont agt. Erie R. R. Co.*, 52 *Barb.*, 637; *Mills agt. Roaewald*, 13 *Hun*, 439; *Smith agt. Spaulding*, 3 *Rob.*, 615). If new facts had arisen since the first motion was made, entitling her to the relief asked, the motion might be made without leave to renew (*Ramsey agt. Erie R. R. Co.*, 57 *Barb.*, 450; *Ray agt. Connor*, 3 *Edw. Ch.*, 478; *Willett agt. Faqueweather*, 1 *Barb.*, 72; *Smith agt. Spaulding*, 3 *Rob.*, 615). The case of *Pattison agt. Brown* (12 *Abb.*, 142) holds that a renewal of a motion to open a judgment taken by default cannot be entertained on the

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ground of a defense which was known to the defendants when the original motion was made. It should have been stated in the first motion. In *Desmond* agt. *Wolf* (6 *N. Y. Leg. Ob.* 389), a plaintiff moved to set aside a demurrer as irregular and failing in that, moved to set aside as frivolous, and it was held the second motion could not be entertained without leave of the court (*See, also, Schlaman* agt. *Myerstein*, 19 *How.*, 412).

IV. At the time of the motion Mrs. Alberger had no interest in the attached property, and was not entitled to make the motion. The copy of affidavit served upon plaintiff's attorney, did not allege any ownership by Mrs. Alberger of the farm in Niagara county. It is claimed, however, that the omission was a clerical error, and that the original affidavit did allege that fact. But even if we assume that Mrs. Alberger is not bound by the copy as served, we insist that plaintiff has shown ~~that~~ she had no interest in the land at the time of the motion. We show by the affidavits of McIntyre and Murphy that for the past six months Mrs. Alberger has resided in Buffalo, more than twelve miles distant from the property, and that she is not now in the possession of the same, and that Samuel F. Alberger is now in possession of the property. This fact would overcome any presumption of present ownership in Mrs. Alberger, even if such was raised by the form of her allegation (*Hill* agt. *Draper*, 10 *Barb.*, 454; *Blunt* agt. *Aiken*, 15 *Wend.*, 522; *Brown* agt. *Bowen*, 30 *N. Y.*, 512). And there is no presumption of tenancy (*Blunt* agt. *Aiken*, *supra*). Besides that we prove by the affidavit of Garland, the declaration of Mrs. Alberger, November 21, 1879, that since she swore to her motion papers, she had conveyed this land to her daughter, and then had no interest in it whatever.

V. The original affidavits together with the affidavits of Mrs. Alberger and Mr. Rice, in the moving papers, are sufficient to sustain the attachment, and plaintiff may use the facts stated in the moving papers to sustain the attachment

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and defeat the motion. The question presented upon this motion is, whether the original affidavits together with the affidavits of Mrs. Alberger and Mr. Rice are sufficient to sustain the attachment. It is not necessary, for the purpose of obtaining an attachment, to furnish such proof as is deemed legal evidence upon the trial of an action. Affidavits upon information and belief have been repeatedly held to authorize the issuing and support of such process, especially when the sources of information are stated (*Peel* agt. *Elliott*, 16 *How.*, 481; *Matter of Bliss*, 7 *Hill*, 187; *Noble* agt. *Halliday*, 1 *Com.*, 330-336; *Matter of Fitch*, 2 *Wend.*, 298; *Morgan* agt. *Avery*, 7 *Barb.*, 656). The statute authorizing the granting an attachment requires proof only "to the satisfaction of the judge" granting the same. And, under a statute of similar requirement, the oath of two witnesses that they believed, &c., without stating any ground of belief was held sufficient (*Matter of Fitch*, 2 *Wend.*, 298; *Noble* agt. *Halliday*, 1 *Com.*, 336; *Matter of Haynes*, 18 *Wend.*, 614). The court, in the latter case, and in many others cited, say that statements made upon information and belief are given greater force as proof by the omission to deny or explain them (*Smith* agt. *Frank*, 4 *Rob.*, 628; *Wolf* agt. *Brower*, 5 *Rob.*, 602-604). And in such case the plaintiff is entitled to all intendments and inferences which may be drawn from the statement (*Thompson* agt. *Erie R. R. Co.*, 9 *Abb. [N. S.]*, 212-227; *Livermore* agt. *Rhodes*, 27 *How.*, 507; *Morgan* agt. *Avery*, 7 *Barb.*, 633).

A. C. Rice, for appellant.

I. The court of appeals have decided that the original affidavits were insufficient, and contained no evidence giving the judge jurisdiction to issue the attachment. See opinion printed in these points. As the special term put its decision upon one specified point, we will assume that it decided against the plaintiff on all other grounds, and the decision on the facts, though not conclusive, should be controlling. No affidavits could be used to support the original affidavits (*See*

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this case, 56 *How.*, 345). Whatever facts appeared in affidavits read for other and proper purposes are presumed to have been used for that purpose only, and were not considered for the improper purpose; especially as the court put its decision upon a definite point (*See opinion of court of appeals*, 79 *N. Y.*, 252).

II. Was the first motion a bar to the second? We think not. It was founded upon a specific title, the judgment and execution. It could not effect the attachment as to the real estate, as the judgment was not a lien upon the real estate. The order granting the motion did not and could not extend beyond the foundation of the motion. The second motion is founded upon an independent title, was made in season and was not in any wise connected with the subject matter of the first motion. The first was granted, and if by accident or inadvertence Mrs. Alberger did not include in her first motion papers the separate title she had for a separate and distinct parcel of property affected by the attachment, it would be a mockery of justice to say that the granting of the relief in the first motion should be a bar to relief as to all other property held by a distinct title. The rule that a motion once denied on the merits cannot be renewed on the same facts, without leave of the court, is not established by statute or the standing rules of the court, but is a rule of common-law practice, and has never been applied in a case where one of two motions relating to distinct parcels of property has been granted. A very different rule is ordinarily supposed to exist in such cases. When the property and the title by which it is held are distinct, but the ground of the motion is the same, the granting of one motion is supposed to be conclusive against the defeated party, so far as the ground for the motion is in question. In this case the plaintiff is not at liberty on this motion to contest the sufficiency of the original affidavits. Mrs. Alberger had a lien upon personal property by virtue of her execution, and owned real estate by a separate title, her deed. She could enforce her lien and her right by separate

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remedies. In the pursuit of either remedy, if she encountered a barrier, she could have it removed if she applied in season; and having removed that barrier in the pursuit of one remedy, she is not barred from removing the same obstruction when reached in the pursuit of the other remedy. The common-law rule of practice that a motion once denied on the merits cannot be renewed without leave of the court, has grown up in the last hundred years; and yet in no case, from *Davies* agt. *Cottle*, decided in 1789 (3*d Term Rep.*, 405), to the present time, has the rule been applied to a case where a motion has been granted as to a distinct subject matter. I shall not cite the numerous cases reported, but shall assert that upon a careful examination there is not a single case sustaining the decision in this case.

III. It is a well settled rule that a new motion is a matter of right, when based upon facts arising after the first motion (*People ex rel Barry* agt. *Mercein*, 3 *Hill*, 399). And this rule has been held to include cases where the facts came to the knowledge of the party after the first motion was made.

ANDREWS, *J.* — When this motion was noticed for the special term, the first motion, founded upon the judgment and execution in favor of Louisa F. Alberger, had been denied by the special term on the ground that her judgment was not, by reason of the failure of the clerk to enter it in the judgment book and other omissions, a valid judgment, and that she acquired no lien by the judgment or execution on the property of Samuel F. Alberger.

The present motion was not founded upon her right as lienor to move to vacate the attachment, but upon her right as grantee of Samuel F. Alberger under the deed of December 3, 1877. The second motion was not, therefore, in the nature of an application to review the question decided on the first motion, and the decision on that motion that she was not a lienor under her judgment and execution was in no way inconsistent with a new motion founded upon her owner-

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ship of the land attached. The fact that she might on the first motion have proceeded on this ground also, did not preclude her from resorting to an independent motion to vacate after the first motion was denied.

The rule which forbids the splitting up of a single demand and bringing separate actions at law thereon, has no application to a proceeding of this character. The grounds of intervention by the two motions were entirely distinct. The relief sought was also different.

In both motions she sought to vacate the attachment, but in the first she sought to remove it as an obstruction in the way of the enforcement of her judgment and execution, and in the second as a cloud upon her title under the deed. The first motion related both to real and personal property, and the second to real property alone. Under her deed she acquired no right or title to the personal property levied on the execution.

The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision of the former motion, cannot apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion. We are, therefore, of opinion that the denial of this motion by the special term, on the ground that no leave to renew the motion having been given, the decision of the former motion was a bar to the second motion, was erroneous. Moreover the doctrine of *res adjudicata* does not apply with the same strictness to decisions on motions as to judgments.

The general term affirmed the decision of the special term on the first motion, and this court on appeal granted the motion, and afterwards on the application of the plaintiff, limited its order of reversal so as to vacate the attachment as to Louisa F. Alberger, so far as it affected her rights under her judgment and execution against the individual property of Samuel F. Alberger. By implication it is said that this

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order affirms the attachment as to all rights existing in Mrs. Alberger when the attachment was issued, except those derived under her judgment and execution. The only question before this court on that motion, was whether the attachment was valid as against her judgment and execution, and the court decided it was not.

There could have been no intention to affirm the validity of the attachment as against any other title which she may have had against the property attached, as it was vacated for inherent and jurisdictional defects in the attachment proceedings. But it is sufficient to say that when the second motion was noticed, the first motion stood denied, with the denial affirmed by the general term, and Mrs. Alberger had the right to institute a new motion founded upon a different right, which did not involve a review of the decision of the special term on the first motion. The last decision of this court on the first motion disposed of the question as to the sufficiency of the affidavits upon which the attachment was issued adversely to the plaintiff.

We think the order of the general and special term should be reversed, and an order entered vacating the attachment as against the land embraced in Mrs. Alberger's deed.

The plaintiff can contest in an action the alleged fraud in that conveyance.

All concur, except EARL, J., dissenting, and MILLER, J., not voting.

NOTE. — This case has met with a varied experience, and we have followed it with considerable interest. The attachment was levied upon about \$20,000 worth of property, real and personal, of Samuel F. Alberger, one of the defendants. He immediately thereafter conveyed the land to Louisa F. Alberger, and fifteen minutes after that confessed the judgment in favor of Louisa F. Alberger. The latter then moved as execution and judgment creditor, to vacate the attachment for insufficiency of original affidavits, not mentioning her deed.

The special term *held*, that under the new Code (*secs. 682, 683*), additional affidavits might be used by plaintiff, and denied the motion, and the general term so *held* (*See special and general term opinions, 55 How., 481*).

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The court of appeals held otherwise and reversed the order, and sent the case back to the special term to be heard upon the sufficiency of the original affidavits (*See 56 How.*, 345; *75 N. Y.*, 179).

It was then discovered that the judgment by confession, under which motion was made, had never been entered, and the special term *held*, that she had no standing as creditor to make such motion.

The general term affirmed this order on the ground that the *original affidavits were insufficient*.

The court of appeals reversed the order and *vacated the attachment* (*See 78 N. Y.*, 252).

A motion for a reargument was made and the court of appeals modified its decision so as to affect only the lien under which the motion was made, which very substantially changed the decision in *78 New York*, 252, for instead of vacating the attachment generally, as in the decision in *78 New York*, 252, the court adopted the theory that the motion by a creditor was simply enforcing the lien stated in moving papers, and that the attachment was not vacated as to any other right or lien, in analogy to a creditor's bill to set aside fraudulent deed (*See opinion above*).

It was then discovered that the deed which was not referred to in the motion papers, was a little ahead of the judgment (say fifteen minutes), and that, therefore, her judgment was not a lien upon the land.

Her first affidavit alleged a judgment lien upon the land. She then moved upon her deed to vacate, and the special term *held* the first motion a bar.

This was affirmed by the general term, and as will be seen, reversed by the court of appeals (*See opinion above*).

The attachment fight between Mrs. A. and the bank, has been a long and tedious one, having been before twenty-six judges of the state and four times before the court of appeals, including the motion for a reargument.

The modification of the decision in *78 New York*, 252, is so important, that we thought it worthy of notice. —[REp.]

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SUPREME COURT.

ABRAHAM S. CASSEDDY *et al.* agt. GEORGE H. WALLACE *et al.*

Compulsory reference — when it may be ordered — Action for partition — Code of Civil Procedure, secs. 521, 1013, 1544, 1546, 1547, 1557, 1577.

Where, in an action for partition, there are a large number of defendants and many separate appearances, and where the case presents four distinct issues of fact, two of which affect distinct parts of the property, and the other two affect undivided shares in the whole of the remainder :

Held, that, though the cause can be better tried by reference than in any other way, yet, if any of the parties object to a reference, the case must go to a jury.

But, except as to the issues raised by claim of ownership of two pieces of the property, a compulsory reference may be ordered, and the action may be severed so as to try separately before a referee the issues as to the remainder of the property, the title to which is not in dispute.

Special Term, July, 1881.

Cassedy & Brown, plaintiffs' attorney.

Attorney-General Ward, for the people.

B. C. Chetwood, W. F. Dunning, John B. Kerr, G. B. Taylor, George W. McAdam, and Marsh, Wilson & Wallis, for individual defendants.

DONOHUE, *J.* — This action is brought to partition certain real estate, consisting of thirty-two separate pieces, situated in the city of New York, and three others, located in Orange county. There are thirty-four defendants, and thirteen separate appearances, and the cause presents four distinct issues of fact. Two of such issues affect distinct parts of the property, and the others affect undivided shares in the whole of the remainder. First. The defendants, Eliza Harrison and

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Jane Wallace, claim that the property described in the complaint as No. 312 Canal street was not owned by George Harrison, deceased (the person under whom it is alleged the several parties to the action are entitled to share in the real estate) in fee, at the time of his death, but that he held the title thereof in trust for the two said defendants. All the other parties to the action dispute and deny such claim. Second. The defendant Jane C. Bolton claims to own the property described in the complaint as No. 72 Ninth avenue. Third. The defendant John Rooney claims to be the absolute owner of the share which, on the death of George Harrison, descended to Thomas Harrison. The complaint concedes that Rooney held a conveyance for such share, but alleges that the said conveyance is a mortgage in fact, and was given to secure a loan of money, and the answer of John G. Harrison, the heir-at-law of said Thomas Harrison, deceased, avers the same fact. Fourth. At the death of George Harrison, several of the defendants were aliens and residents of Ireland. Such defendants claim to inherit under chapter 261, Laws of 1874, which act amended chapter 115, Laws of 1845. Some of these defendants (at least James Wallace and George Harrison) were at the time of full age; and the statute of 1874 made it necessary for them to make and file in the office of the secretary of state the deposition or affirmation mentioned in the first section of this act (*chapter 115 of the Laws of 1845*). The People of the State of New York are defendants, and appear and claim these shares, and James Wallace and George Harrison claim to be entitled to inherit.

From this statement of the facts and issues of this case, it is apparent that the cause can be better disposed of and tried by a reference than in any other way. None of the questions involved are difficult or intricate, and if expedition is desired, an intelligent and impartial referee should be selected. If, however, any of the parties object to a reference, the issues must be tried by a jury (*Code, section 1544, and see Throop's note, and Hurlett agt. Wood, 62 N. Y., 75*).

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There is, however, no reason to be adduced why, in regard to the remainder and great bulk of the property, there should be any delay, by reason of the fact that the title to these two pieces of the property are in dispute, nor is it reasonable that the plaintiff and other parties in regard to whose rights in the remainder of such property there is no dispute, should be delayed, whilst the defendants litigate among themselves.

The action may be divided for the purpose of trying separately the two issues in regard to No. 312 Canal street and No. 72 Ninth avenue. These issues should be severed from the action and be separately disposed of. The first named property is claimed by two of the defendants, and the latter by a single defendant. This presents distinct issues made by different parties as to distinct pieces of property, and the last named defendant and the court, by its inherent power, as well as by the express provision of the Code (*section 967*), can direct such trials.

As to the remainder of the property, there should be no delay. Upon the pleadings there is no dispute as to the rights of some of the parties, the controversy being between some of the defendants. Such a controversy in no case (*Code, section 521*) need delay a plaintiff; and the Code expressly, in an action of partition (*sections 1546, 1547*), also provides for a partition among parties when rights are ascertained, "from time to time," as the same are ascertained and determined. This is done by interlocutory judgments, and final judgment is rendered only upon completion of the entire partitions (*Code, sections 1557, 1577*).

From the verbiage of *section 1013* of the Code it might be somewhat doubtful whether the court has not the power to refer the whole action. It was held, however, in *Barnes agt. West* (16 *Hun*, 68) that, under *section 1013* of the Code of Civil Procedure, as under the former practice, a compulsory reference, even in cases triable by the court, can only be rendered when the trial of an action will require the examination of a long account; and by *section 1544*, before referred to.

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it would seem that, unless the parties otherwise agree, the issues must be tried before a jury.

Unless, then, the parties agree to a reference of the entire action, which would clearly be the shortest, least expensive and best mode of procedure, the order to be entered will provide for the severance of the action as to the two pieces of property, No. 312 Canal street and No. 72 Ninth avenue, and for a separate trial as to that issue, and a reference as to those parties as to those remaining pieces of property concerning whose title there is no dispute, and a trial of the issues made by some of the defendants among themselves.

The plaintiff's attorneys will prepare an order or interlocutory judgment in conformity with this opinion, which will be settled on notice.

SUPREME COURT.

In the Matter of the Assignment of ALLEN STRAUS & Co.
for the benefit of their creditors.

Assignment — Effect of a bankruptcy composition on a state law assignment.

The right of a creditor to an accounting by the assignee cannot be divested by the mere fact of a composition in bankruptcy, unless that right was in some way relinquished by the creditors, or shall be divested by the order of the court in bankruptcy, as when a composition has been made and accepted, and the terms of the composition have been complied with, the bankruptcy court will order the property in the hands of the assignee in bankruptcy to be surrendered to the bankrupt. If a composition under the bankrupt law has been duly ratified, it confines the creditor to his security and discharges the debtor from liability. But the creditor can pursue any collateral remedies for the collection of his debt.

Where it did not appear whether the proposition for a composition embraced as a part of it that the security which the creditors already held by and under the assignment to P. should be relinquished, and did not appear whether the petitioning creditors, in proving their debts, made any deductions from their face or account of any security

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they had by virtue of the assignment to P., and especially it did not appear whether the bankrupt court, in approving of the composition, took into consideration the amount realized from the assigned property, or estimated that as a part of thirty *per cent*, which was to be paid by the composition, and was agreed to be accepted in satisfaction, or whether the proposition for a composition provided that the security to which the creditors were equitably entitled under the assignment should be relinquished, and as it does not appear that the bankrupt court has authorized P. to deliver back the assigned property to the assignors:

Held, that it was error in the county court to refuse the application of the petitioning creditors for an accounting of the assignee, and releasing him from his liability to account to his *cestui que trust*, and authorizing him to deliver back to the assignors the assigned estate.

Fourth Department, General Term, April, 1881.

Fanning & Williams, for appellant.

J. & Q. Van Voorhis, for respondent Parsells.

TALCOTT, *P. J.*—This is an appeal from an order made under section 22 of chapter 466 of the Laws of 1877, as amended by chapter 318 of the Laws of 1878, entitled “an act in relation to assignments of the estates of debtors for the benefit of creditors.” On the 15th day of August, 1877, Allen Straus & Co., who had been engaged in the clothing business at Rochester, made a general assignment of all their estate to W. W. Parsells for the benefit of their creditors, providing for an equal *pro rata* distribution to and among them without any preferences.

Parsells accepted the trust, qualified and entered upon the discharge of his duties under the assignment. He has received and still holds assets as such assignee amounting to \$8,528.89 less expenses and commissions.

On the 21st of August, 1877, proceedings in involuntary bankruptcy were commenced against said Allen Straus & Co., apparently upon the ground that such assignment to Parsells was an act of bankruptcy, and they were decreed to be bank-

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rupts by the district court of the United States for the northern district of New York.

Prior to the 7th of January, 1878, the said Allen Straus & Co., filed their petition with said district court for the composition of their debts in the manner directed by the seventeenth section of the amended bankrupt act, approved June 22, 1874. No assignee was ever appointed in the said bankruptcy proceedings. But the fact of the said assignment to Parsells it appears was brought to the notice of the said court in bankruptcy by the petitioning creditors to the county court, in this case, who, as it appears, claimed in the bankruptcy court that the assets assigned to Parsells should be administered and applied by the said Parsells in pursuance of his trust. Parsells did not appear in the court in bankruptcy, and took no part in the proceedings in that court. Several meetings of the creditors were held under the said section 17 of the amended bankrupt law of 1874; but no proceedings were ever taken in the bankruptcy court or otherwise to have the assignment to Parsells set aside, and the proposition of Allen Straus & Co., for a composition was finally accepted by the requisite number and amount in value of their creditors as prescribed in the said section 17 of the amended bankrupt act. The proposition of Allen Straus & Co., which is not specially set forth in the papers in this case as is inferable from statements contained in the papers, was to pay to all their creditors thirty per cent of their debts, which proposition is inferred to have been in the language of said section 17 of the amended act, that the composition proposed should be accepted by the creditors "in satisfaction of the debts due to them from the debtor."

The proposition, having been accepted by the requisite number of the creditors in amount and value, was approved by the court in bankruptcy and duly recorded as provided by section 17, and the thirty per cent provided for in the composition was duly paid to the creditors, and the petitioning creditors in this case received and accepted the dividend of

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thirty per cent offered by the said proposed composition. Afterwards certain of the creditors filed their petition in this matter, addressed to the county court of Monroe county, alleging that Parsells had never accounted in relation to his trust either in the bankruptcy court or elsewhere, and praying that a citation be issued to the said Parsells, as such assignee, to show cause why he should not account for the money which came to his hands as such assignee.

On the return day of the citation to Parsells he appeared by attorney, and filed his petition addressed to the county court of Monroe county, setting forth the history of proceedings in bankruptcy and the making and acceptance of the composition, also setting forth a partial account showing a balance of \$7,935.89 in his hand as such assignee, and praying that he may be authorized to release to the assignors the assets so assigned, and that his account be settled and he be discharged from his said trust, whereupon a citation was issued to all parties interested in the assigned property, as creditors or otherwise, which citation having been duly served, the petition of creditors and of Parsells came on to be heard at the same time before the said county court, which afterwards, on the 20th day of January, 1879, made an order, judgment and decree whereby, after reciting in substance the foregoing facts, ordered, adjudged and decreed that the said assignee Parsells be discharged from all further liability to the compounding creditors of the assignors, and that said assignee be authorized to release the assets in his hands to the said assignors. From which order and decree of the county court the petitioning creditors appeal to this court.

This brings up a question as to the effect of a composition in bankruptcy as provided for by the seventeenth section of the amended law, which cannot be solved by the express provisions of that section.

It is to be noticed, however, that the thing provided for is a "composition" of all the debts of a bankrupt, and it is provided that all the creditors may resolve "that a composition

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proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor." The creditors, therefore, are presumed to have accepted the composition proposed by the debtor in "satisfaction of the debts due to them from the creditors," as the act makes no provision for an acceptance of the proposition except in satisfaction of the debts.

The statute (*sec.* 17) also contains the further provision, viz.: "Every such composition shall be subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction in money to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up."

There is nothing in the case before us to show whether the court in bankruptcy considered and treated the assignment to Parsells as a partial security to the creditors or not, or whether in the proceedings in bankruptcy the creditors proved their debts as provided by the bankrupt law, or not; or if they did prove them, whether they proved for the whole face of the debt, or what deduction was made, if any, on account of the assigned property. Section 5075 of the bankrupt law (*U. S. Revised Stat.*) provides as follows, viz.: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt or a *lien thereon for securing the payment of a debt* owing to him from the bankrupt, he shall be admitted as a creditor for only the balance of the debt after deducting the value of such property to be ascertained," &c.

The priorities specified in that part of section 17 above quoted are supposed to be those specially provided for in section 5101 (*U. S. Rev. Stat.*), and therefore do not embrace, so far as appears, any of the debts due to the petitioning creditors in this case. But the question still remains whether, by virtue of the assignment creating a trust for their benefit, the creditors did not have a lien upon the estate assigned to Parsells for the security of their debts *pro tanto*.

Equitable liens are supposed to be as much within the

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statute as legal liens, unless there is some prohibition in the state law, which renders them invalid (*Parker* agt. *Mugridge*, 2 *Story*, 334; *Fletcher* agt. *Morey*, *Id.*, 555; *Peck* agt. *Jenness*, 7 *How.*, 612; *Davis*, assignee, &c., 2 *Bank Reg.*, 392). The assignment to Parcels was not void under the laws of the state *per se* (*Haas* agt. *O'Brien*, 66 *N. Y.*, 508).

Whether it would have been held to be void in an action commenced by an assignee in bankruptcy to have it set aside, or could have been decreed to be void by any proceedings in the bankrupt court, on the ground that such an assignment was in hostility to the bankrupt law and tended to defeat that law, because providing for the administration of the assets by a different agency from that prescribed by the bankrupt law (See *Mayerd et al.* agt. *Hellman*, 91 *U. S.* [1 *Otto*], 496). If a composition under the bankrupt law has been duly ratified, it confines the creditor to his security and discharged the debtor from liability (*In re Lyth*, 14; *Nat. Bank Reg.*, 459). But it has been held in many cases that the creditor can pursue any collateral remedies for the collection of his debts (See *Haas* agt. *O'Brien*, 66 *N. Y.*, 59; *Thrasher* agt. *Bently*, 59 *N. Y.*, 649).

In a proceeding before the New York common pleas, in a case where the debtor had made a composition in bankruptcy, an assignee was, on the petition of creditors, ordered to account, notwithstanding such composition, it not appearing that he had delivered the assigned estate to the assignors with the approval of the bankrupt court (*In the matter of Hermann*, 53 *How. P. R.*, 377).

As it does not appear whether the proposition for a composition embraced as a part of it that the security, which the creditors already held by and under the assignment to Parcels should be relinquished, and does not appear whether the petitioning creditors, in proving their debts, made any deduction from their face on account of any security they had by virtue of the assignment to Parsells, and especially as it does not appear whether the bankrupt court, in approving of the

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composition, took into consideration the amount to be realized from the assigned property, or estimated that as a part of the thirty *per cent*, which was to be paid by the composition and was agreed to be accepted in satisfaction, or whether the proposition for a composition provided that the security to which the creditors were equitably entitled under the assignment should be relinquished.

And as it does not appear that the bankrupt court has authorized Parsells to deliver back the assigned property to the assignors, we think the county court erred in refusing the application of the petitioning creditors and releasing the assignee Parsells from his liability to account to his *cestui que trusts* and authorizing him to deliver back to the assignors the assigned estate.

In other words we think the right to an accounting by the assignee, cannot be diverted by the mere fact of a composition in bankruptcy, unless that right is in some way relinquished by the creditors or shall be divested by the order of the court in bankruptcy, as when a composition has been made and accepted, and the terms of the composition have been complied with, the bankruptcy court will order the property in the hands of the assignee in bankruptcy to be surrendered to the bankrupt.

The order, judgment and decree of the county court appealed from is reversed, with costs to the appellant to be paid out of the trust funds, and the assignee, W. W. Parsells, is ordered to account as prayed for in the petition in behalf of *Fenno et al. agt. Creditors of Allen Straus, &c.*, in the county court, to which court the proceedings are remitted.

Briggs *et al.* agt. Central National Bank.

N. Y. COMMON PLEAS.

JAMES BRIGGS *et al.*, respondents, agt. THE CENTRAL NATIONAL BANK, appellant.

Bills, notes, checks — When the certifying of a check by a bank operates as a payment of a check — When charging and crediting a check constitutes a payment.

Where a check deposited by plaintiffs with defendant for collection was sent by defendant to a bank which was its collecting agent, the latter bank charging the check to the drawer's account, and crediting defendant with the amount in pursuance of an arrangement made between the two banks, the checks being returned to the drawer, a third party, as a voucher, and the collecting bank then failed and passed into the hands of a receiver:

Held, that such charging and crediting constituted a payment of the check to defendant, rendering it liable for the amount of the check to plaintiff.

General Term, April, 1881.

Before DALY, C. J., J. F. DALY and VAN HOESEN, JJ.

APPEAL from a verdict directed for the plaintiffs.

The plaintiffs were depositors in the bank of the defendant. On the 9th day of June, 1880, they deposited with the said bank a check for \$610.97, drawn by one O. W. Haines on the First National Bank of Newark, New Jersey. The defendant forwarded this check to the latter bank so that it received the same on June tenth. The First National Bank of Newark aforesaid was then, and had for years prior been, the agent of the defendant for the collection of all paper, notes, checks and drafts payable in the state of New Jersey. And the First National Bank kept an account with the defendant, in which it credited the bank with all collections made, and charged it with all remittances made, whether of money or drafts, and this collection account was settled every Tuesday by draft on

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the Central National Bank, the defendant. On receipt of the check aforesaid, this bank, the agent of the defendant, being also the drawee of the check, paid it by crediting the Central National Bank with the amount and returning the check to the drawee, Mr. Haines, as a paid voucher, to whose account it was charged. Although Mr. Haines' account was not good, nevertheless they had been in the habit of permitting him to overdraw. Be that as it may, Mr. Haines made good this overdraft by paying the amount into bank, so that, as matter of fact, the First National Bank physically received the money for this check. After business hours of the tenth of June the latter bank failed, and a receiver was appointed. It in reality suspended payment June eleventh. When it failed it owed the defendant a balance of \$5,976.22 for various items collected by it for the defendant. On the tenth of June the defendant had moneys of the First National Bank of Newark, which were not drawn upon. The plaintiffs claiming that the check being paid to the agent of the defendant, it was a payment to the defendant, bring this action. On the trial a verdict was directed for the plaintiffs, there being no dispute as to the main facts. The defendant did not ask to go to the jury, nor that they be directed to find for defendant.

Blumensteil & Hirsch, for plaintiffs, respondent.

I. That the First National Bank of Newark was the collecting agent of the defendant, and authorized to collect this check, is undisputed. Payment to it, therefore, was a payment to the defendant, the principal (*Faverie* agt. *Bennett*, 11 *East*, 36 ; *Renard* agt. *Turner*, 42 *Ala.* 117).

II. The check was paid. The transaction, in every aspect of the case, amounted to a payment. First. As matter of fact, Haines, the drawer, made good the overdraft which the charging of the check occasioned, and of course that could only be done by his giving the money to the First National Bank. Second. The acts of the parties amount to payment. The bank charged up the check to Haines, returned it to him

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as a paid voucher, and credited the defendant with the amount on its books. And such was the usual course of dealing between the two institutions. "A payment by a debtor of the amount of his debt to the credit of the creditor at a particular bank at the request of the creditor is a good payment, and where both parties keep an account at the same bank the debtor's debt is discharged as soon as the amount is transferred by the bank from the debtor's to the creditor's account, because such a transfer is equivalent to payment, although no money passes, and if the bank fails the loss will fall upon the creditor and not the debtor, and such failure will not revive the liability of the debtor (*Bodenham* agt. *Purchas*, 2 B. & Ald., 47; *Bolton* agt. *Richard*, 6 Term, 139; *Eyles* agt. *Ellis*, 4 Bing., 112; 2 *Wait's Law and Pract.*, 1064; and *Wait's Actions and Def.*, 381; *First Nat. Bank Jersey City*, agt. *Leach*, 52 N. Y. 352).

III. The failure of the agent to pay over is chargeable to the defendants and not the plaintiffs (*Allen* agt. *Merchants' Bank*, 22 Wend., 215; *Kobbee* agt. *Clark*, *Seldon's Notes of Cases*, 11).

IV. By charging the maker of the check with the amount and crediting the Central National Bank therewith, the First National Bank became the debtor to the Central National, and that could only occur on the theory that the transaction amounted to a payment (*Commercial Bank of Penn.* agt. *Union Bank*, 11 N. Y., 214).

V. The defendant and not the First National Bank of Newark was the agent of the plaintiffs. There is no privity of contract between the latter bank and the plaintiffs, and we could not maintain any action against the Newark bank for this check, nor have we any claim against its receiver. This point was expressly decided in *Commercial Bank* agt. *Union Bank* (11 N. Y., 211); *Montgomery Bank* agt. *Albany City Bank* (3 Seld., 469).

VI. As between the two, the defendant became the creditor of the First National Bank of Newark upon the credit

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being given by the latter to the former of the amount of the check. The maker of the check was discharged, for he paid his money and received back the voucher. The plaintiff could maintain no action against Haines, for he had paid the check, nor could we sue the Newark bank, for there existed no privity of contract between us and that bank (*Commercial Bank* agt. *Union Bank*, 11 *N. Y.*, 211). Consequently the plaintiffs are without any remedy whatever, unless they can successfully sustain this judgment.

VII. The defendant did not ask to go to the jury nor that a verdict be directed in his favor. The judgment should be affirmed, with costs.

George A. Strong, for defendants, appellants.

I. This action reveals a most dishonest attempt on the part of the plaintiffs to shift from themselves upon defendant the amount of a loss occasioned by the failure of a bank in Newark, New Jersey. It is not pretended, and it would be impossible for plaintiffs to pretend, that defendant did, or omitted to do, anything with reference to this check contrary to the requirements of the most rigid good faith and care. The sole question in the case is whether, by any technicalities of a constructive receipt of the money, plaintiffs can succeed in their attempt to shift the misfortune arising from the failure of this Newark bank. We assume that it would only be with the utmost reluctance that any court would pronounce in favor of such an attempt.

II. Nothing will sustain an action for money had and received but proof of money actually received by defendant, either himself or through an agent. This proposition has been most emphatically laid down by the court of appeals, which has declared that in such an action the actual receipt of the money is the only issue to be tried (77 *N. Y.*, 400). Now it is indisputable that the defendant in this action never received any money. In the first place, the Newark bank had no money belonging to Haines. It simply owed him

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a debt, which it undertook to pay to him or to his order. This payment it has never yet made. The strongest view which plaintiffs are entitled to urge upon the evidence and the authorities is that the book-keeping given in evidence amounted to a novation of debts. No money changed hands. Money did not enter into this transaction, which was a shifting of credits, not a payment of cash. Nothing was changed but obligations, and proof that defendant received the obligation of the Newark bank does not satisfy the allegation of the complaint. This very doctrine has been laid down by the court of appeals in several cases. In *People agt. Merchants' Bank* (78 N. Y., 269, *see p.* 273), where just such book-keeping as in the case at bar was relied upon as a payment of money, the court said: "Suppose it were (*i. e.*, an agent to receive payment). What did it receive as such payment? Simply its own obligation. If anything was set apart by charging up the check, it was only so much of the bank's indebtedness to its depositor. It constituted itself debtor to the holder of the check in place of its indebtedness to its depositor." Again, in *Whiting agt. City Bank* (77 N. Y., 363, *see p.* 368), the court deny that an action for money had and received will lie simply because as a matter of book-keeping a check has been credited as paid. The defendant in that case had marked the note as paid, and actually mailed a draft to the holder thereof. It then decided to retract the payment, and gave notice of non-payment in good time. But the court say that even under these strong facts "an action for money had and received would not be appropriate." Although the note was sufficiently paid to discharge the indorser it was not sufficiently paid to sustain that action. This last case shows that plaintiffs have no ground to sue defendant for money had and received, but should have sued for a failure to collect the Haines' check, if they could show any default. It is precisely because they cannot show any default that they seek to uphold this constructive payment.

III. The Newark bank could not act as agent for defendant

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in this transaction. The theory on which this action was tried and decided was that "in law it (defendant) received the money by the latter bank (the Newark bank) as its agent. This theory is utterly untenable. The Newark bank could not be defendant's agent to collect this check, for the reason that being the bank on which the check was drawn, it could not act as principal for itself and agent for another in the same transaction. One and the same person cannot sustain such inconsistent relations. This general principle has been repeatedly decided. In *Clafin* agt. *Farmer's Bank* (25 *N. Y.*, 293), the court say that a man "cannot act as agent in regard to a contract to which he is a party on the side opposite to his principal" (*pp.* 294, 295), and they accordingly held that a president of a bank could not certify his own check on that bank. In *Hardy* agt. *Metropolitan, &c., Co.* (*L. R.*, 7 *Ch. App.* 427), we have a decisive authority in point. One Dutton was agent for both plaintiff and defendant. Defendant gave Dutton a check in payment of money which it owed to plaintiff. Dutton had the check cashed and used the proceeds. *Held*, that defendant was still liable, because Dutton could not, as plaintiff's agent, receive money from himself as defendant's agent. Would the case have been any stronger against plaintiff if Dutton himself had been the debtor? And yet this latter supposition is the case at bar. But this question also must be considered as settled by the court of appeals. In the *Merchants' Bank* case (*already cited* 78 *N. Y.*, 269, *see p.* 273), it was expressly said that the doctrine that a bank, by mailing a check to another bank on which the check is drawn, constitutes this latter bank its agent to receive the proceeds, "is rather metaphysical." In such a case the check is sent "for payment, not for collection," and the result is "simply to give credit to the bank, not to constitute an agency." This point also came up, and was ruled the same way in *Nidig* agt. *National City Bank* (59 *How. Pr.*, 10). It was proper for defendant to send the check directly by mail to the Newark bank, instead of employing an intermediate

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agent (*Shipsey agt. Bowery, &c., Bank*, 59 *N. Y.*, 485), and plaintiff's judgment cannot stand unless the court is prepared to hold that I can appoint a man my agent to collect money from himself.

DALY, *C. J.* — The judgment should be affirmed. The appellant claims that this is an action for money had and received, and cites *The People, &c., agt. The Merchants' Bank of New York* (77 *N. Y.*, 269), an authority for the proposition that an action for money had and received cannot be sustained unless the money was actually received, either by the defendant or through his agent; in respect to which, in the present case, it is sufficient to say what was said in the case that the appellant cites of *The People, &c., agt. Merchants' Bank*, that "all the facts are set forth in the complaint, and that if they disclose a good cause of action the plaintiff may recover, notwithstanding he may have assigned an insufficient ground of recovery." The ground assigned for a recovery by the plaintiff are the facts stated in his complaint, and if they constituted a cause of action it is wholly immaterial whether the action is called an action for money had and received, or what name is given to it.

The facts substantially stated, and which have been proved, are that the plaintiffs deposited with the defendants for collection a check for \$610.97, drawn by O. W. Haines on the First National Bank of Newark, New Jersey; that the defendants forwarded the check to that bank, which bank was then and had been for fifteen years the defendants' collecting agent of checks, drafts and other commercial paper, in New Jersey. The National Bank of Newark, on receipt of the check, charged it against the account of the drawer, and as they kept a collection account with the defendants they credited the defendants with the amount of the check in that account as a cash item, in pursuance of an arrangement made between the two banks, by which checks, drafts and commercial paper, when collected, were credited to the defendants

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in a collection account, which was settled every Tuesday by the Newark bank, and the amount collected remitted to the defendants by draft. When the Newark bank charged the check to the drawer's (Haines') account, his account had been overdrawn; but he had been in the habit of so overdrawing, having done so some thirty times during the nine months preceding, and in this instance he made good the overdraft, and the check was returned to him as a paid voucher. On the day after the check was charged to his account and credited by the bank to the defendant's collection account, the Newark bank failed and passed into the hands of a receiver.

The charging of the check by the Newark bank to the drawer's account, and crediting the amount of it in the collection account kept with the defendants, was a payment of the check by the bank to the defendants as effectually as if the bank had paid it in money over their counter. In *Eyles* agt. *Ellis* (4 *Bing.*, 112) the defendant had been directed by his creditor to pay a certain sum in a bank where they both kept accounts. The defendant accordingly directed the bank to transfer that amount from his account to the credit of the plaintiff's account, which was done, and the bank failed before the plaintiff knew of the transfer. The court held that this was a payment of the amount to the plaintiff; that although no money was transferred in specie, it was an acknowledgment by the bank that they had received that amount for the plaintiff; that the plaintiff might then have drawn for it, and the bank could not have refused to pay his draft. This was a case of money paid into a bank. *Bolton* agt. *Richardson* (6 *T. R.*, 139) was a case of money to be drawn from one. A. held B.'s check on a bank where each had an account. On presenting the check, the amount of it was transferred from B.'s account with the knowledge of both parties. The bank failed before the check fell due; and it was held that this was a payment of the check.

In *The First National Bank of Jersey City* agt. *Leach* (52 *N. Y.*, 352), it was held that the certifying of a check

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by a bank in which the drawer had funds to meet it, where the bank within an hour or two failed, operated as a payment of the check between the parties.

I see nothing to distinguish this case from those above cited. It is simply the presentation of a check to a bank by a person entrusted with the collection of it, where both he and the drawer have accounts in the bank, and where the bank, instead of paying the check in so much money, simply charges the amount of it against the account of the drawer, and credits the amount to the account of the collector, returning the check to the drawer as collected and paid.

As between the defendants' bank and the Newark bank, this mode of collecting—by placing the amount to the defendants' credit and settling the collection account every Tuesday—had been in use from the year 1876, the time of settlement before that being every ten days; and when this amount was transferred from Haines' account, and credited in the account of the defendants, the check was paid as effectually as if the amount of it had been handed to the receiving teller of the defendants' bank in national currency.

The plaintiffs have no claim against the Newark bank (*Commercial Bank of Pennsylvania* agt. *Union Bank of New York*, 11 N. Y., 211). It was their agent for the collection of the check. It did what it (the defendants) regarded as the collection of it, and if the defendants did not get the proceeds, in consequence of the Newark bank's suspending payment, it was owing to the business arrangement between the two banks by which collections made were credited to the defendants, and the collection account settled every Tuesday, and but for this arrangement, which was for the convenience of both banks, the money could have been drawn upon the presentation of the check, for the Newark bank met all its engagements that day up to the close of business hours. The plaintiffs, as I have said, can maintain no action against the Newark bank to recover from it what they have never received—the amount of the check. The defendants, on the

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contrary, are creditors of that bank to the amount of it, and have already received a dividend upon it from the assets of that bank. When the Newark bank stopped payment and went into the hands of a receiver, it owed the defendants a balance of \$5,976.22; and the defendants filed and proved claims before the receiver for that amount, as expressed in the claim for collecting sundry accounts in respect to which the defendants were acting as agents, and upon the claims so filed a dividend was declared of eighty per cent, seventy per cent of which the defendants had received at the time of the trial.

The judgment should be affirmed.

J. F. DALY and VAN HOESEN JJ., concur.

SUPREME COURT.

EMMA J. DARCIN, respondent, agt. PALMER B. WELLS,
appellant.

Receiver — when should not be appointed in partition suit — Insufficiency of affidavit.

Where, in a partition suit, one of the parties in interest has in his possession a portion of the estate, and has been in the habit of collecting the rents, as he alleges, for the protection of the income from waste, a receiver of such property should not be appointed upon affidavit upon information and belief, that such party is of little or no responsibility.

First Department, General Term, May, 1881.

Before DAVIS, P. J., and BRADY, J.

APPEAL from order of the special term, appointing the receiver.

F. J. Moissen, for appellant.

Alex. Thain, for respondent.

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BRADY, *J.* — The action was brought for the purpose of partitioning certain real estate which formerly belonged to one Julia Wells, deceased. The interest of the plaintiff was alleged in the complaint as one-ninth, and of Palmer B. Wells as one-third. It appears, also, that Palmer B. Wells has in his possession a portion of the estate, and has been in the habit of collecting the rents, as alleged by him, for the protection of the income from waste. He also avers that he has been ready at all times to account for the money received by him. The charge of insolvency made upon the points of the respondent, is not sustained by the proof, the statement upon that subject being simply one made by the respondent's attorney, in which he says that the defendant is informed and believes that Wells is a person of little or no responsibility. There is nothing upon the facts presented for our consideration, therefore, to warrant the conclusion that a receiver at present is necessary to protect the income from waste. Wells, as a tenant in common, is entitled to possession of the property as well as the others, and is liable upon a settlement of the estate, or upon a partition of it, to account for his occupancy of the premises according to the rental which may be determined in a proper investigation for that purpose.

For these reasons we think that the order appointing the receiver was improvident and should be reversed, with ten dollars costs and disbursements, and the motion denied, without prejudice, however, to another application founded upon proper affidavits and papers.

DAVIS, P. J. concurs.

Jessurun agt. Mackie *et al.*

SUPREME COURT

ELIAS JESSURUN, an infant by his guardian *ad litem*, respondent, agt. JAMES B. MACKIE *et al.*, appellants.

Summary proceedings to recover possession of real property — Where tenant is an infant, guardian should be appointed by the court at request of infant — Remedy where court refuses to appoint — Appeal — Injunction not the proper remedy — Code of Civil Procedure, §§ 2260-2265.

In summary proceedings by a landlord to remove a tenant, where such tenant appeared and interposed an answer that he was an infant, and asked that a guardian *ad litem* be appointed, it was probably error in the district court justice to refuse to do so, for which the proceedings should have been reversed.

But the remedy of the tenant was by appeal or motion to set aside the judgment, instead of an independent equitable action for a perpetual injunction against the enforcement of the order of dispossession.

Section 2265 of the Code of Civil Procedure prohibits the granting of an injunction in such a case as this.

First Department, General Term, May, 1881.

Before DAVIS, P. J., BRADY and DANIELS, J. J.

APPEAL from order of the special term granting injunction *pendente lite*.

G. H. Breuster, for appellants.

Benno Loewy, for respondent.

DAVIS, P. J. — The respondent, Elias Jessurun, is the tenant of the appellant James B. Mackie, of certain premises, under a lease executed by Mackie to him. Proceedings to remove him as such tenant from the premises for non-payment of rent were commenced in a district court of the city under title 2 of chapter 17 of the Code of Civil Procedure,

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entitled "summary proceedings to recover possession of real property." On the return day of the precept the tenant Jessurun appeared and objected that he was an infant, and that no guardian *ad litem* had been appointed for him. The proceedings were adjourned until the following Monday, and on that day the tenant again appeared and put in an answer alleging that he was an infant, and asked that a guardian *ad litem* be appointed on his behalf. The justice ruled that no guardian *ad litem* was necessary in this case, and proceeded to the trial without appointing such guardian, and made a final order for the removal of such tenant. Thereupon the tenant, by Solomon Jessurun, his guardian *ad litem*, commenced this action against James B. Mackie, the landlord. George W. Parker, the justice before whom the district court was held, and Dennis McDermott, the marshal of said court, praying for a perpetual injunction against them from proceeding to enforce the order of dispossession and from removing him from the premises held by him under such lease. An order to show cause, based upon the complaint and the accompanying affidavits, was made, which contained a temporary injunction. On the return day of that order, the special term, after hearing the parties, granted an injunction during the pendency of the action, with costs of the motion.

There is no provision in the proceedings under the statute known as the "landlord and tenant act," or in the provisions of the Code entitled "summary proceedings to recover real property," for the appointment of a guardian *ad litem* where an infant is proceeded against; but by analogy there does not seem to be much reason to doubt that such a guardian should be appointed by the court where infancy is alleged and made to appear. The reason of the rule which requires the appointment of such guardian in actions and other proceedings is fully applicable to proceedings of this character. This was said by JOHNSTON, J., in *Boyleen agt. McAvoy* (29 Hun, 278) to be "the protection of such persons against what the law adjudges to be their own incompetency to choose attor-

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neys or to conduct their own litigations with suitable prudence and discretion." It certainly would have been the better course for the district court to have appointed a guardian *ad litem* when the answer of the tenant was interposed; and it was probably error for which the proceedings should have been reversed, to refuse to do so. But that question by no means disposes of this appeal.

The failure to appoint a guardian in an action for an infant defendant is not a mere irregularity which the infant could waive before he arrived at his majority. It was, as a general rule, under the former practice, an error of fact for which, upon writ of error and assignment of error of fact, the judgment could not be reversed (*Muchie* agt. *Gray*, 2 *Johns.*, 192; *Bliss* agt. *Rice*, 9 *id.*, 150; *Gosling* agt. *Acker*, 2 *Hill*, 391; *Kellogg* agt. *Clock*, 2 *Code Rep.*, 28).

After the abolition of writs of error for errors of fact, the remedy in such cases in action was held to be by motion. In *McMurray* agt. *McMurray* (9 *Ass. U. S.*, 315) the court held that, by analogy to the old practice, the remedy ought to be limited to two years after the judgment, or after the disability ceased, and a motion to set aside the judgment was on that ground denied. In this case the question of infancy was raised by the answer, duly verified, and by the decision of the court that the appointment of a guardian *ad litem* in such cases was not necessary. If this was error, the remedy was a plain one, to wit, by appeal under section 2260 of the Code. The tenant, however, resorted to an action in this court to restrain the enforcement of the final order by perpetual injunction.

Section 2265 prescribes the modes by which proceedings for the removal of tenants under that title may be stayed or suspended, both before and after final order, and expressly enacts that "an injunction shall not be granted before the final order in a proceeding, except in a case where an injunction would be granted to stay the proceedings in an action of ejectment brought by the petitioner, and upon like terms; or after

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the final order, except in a case where an injunction would be granted to stay the execution of a final judgment in such an action, and upon the like terms."

We think, under this provision, the court below was not authorized to grant the injunction in this case. It was an application after the final order, and it was not a case where an injunction would be granted to stay the execution of the final judgment in an action of ejectment. The remedy of the tenant in such an action would have been by appeal, where the fact of infancy appeared and had been ruled upon, so that the question of correctness of the ruling would have been brought up by the appeal; or by motion to the court in such a case, where the fact of infancy did not appear. We think that no injunction order would have been allowable to perpetually enjoin the proceedings in such a case. The court would simply have set aside the judgment upon motion or reversed it upon appeal, and there would have been no necessity for resorting to an independent action on the equity side of the court for a perpetual injunction. In fact, such a proceeding, if allowed, would operate to deprive the plaintiff in such action of all rights which would be preserved to him on the appeal or by motion; in this case, the tenant has a remedy (if in any mode) by appeal under the present Code as he would have had under the former Code by writ of certiorari. Section 2265 prohibits the granting of an injunction in such a case as this.

The tenant has mistaken his remedy, and the order of the court below must be reversed, with ten dollars costs and disbursements of the appeal, and the motion for the injunction denied, with ten dollars costs of the court below.

DANIELS, J., concurs.

Tracy agt. Stearns.

SUPREME COURT.

WILLIAM TRACY and another, respondents, agt. DANIEL
STEARNS and another, appellants.

*Reference — Action by attorneys for professional services — When compulsory
reference not to be ordered.*

In an action by attorneys for professional services and disbursements, though the bill of particulars contain a large number of charges, yet, as the services were performed and the disbursements made in the prosecution of a single action, it is not a case within the rule permitting a compulsory reference.

First Department, General Term, May, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order made at circuit, directing the trial of this action before a referee.

William H. Tounley, for appellants.

Tracy & Talmadge, for respondents.

DANIELS, J. — The action was brought to recover the amount of the plaintiffs' demand for services and disbursements rendered and made by them as attorneys in prosecuting an action in the supreme court. The bill of particulars contained a large number of charges, and for that reason it was deemed a long account within the meaning of the rule existing upon this subject, and for that reason the reference was ordered. But as the services were performed and the disbursements made in the prosecution of a single action, that rule is not applicable to the case.

The cause of action was still a single subject-matter, not within the rule permitting a compulsory reference to be

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ordered. It was a case, on the contrary, which the authorities are quite uniform in holding should be tried by a jury, unless both parties agree to its trial before a referee (*Brinck* agt. *Public Fire Ins. Co.*, 2 *N. Y. Sup. Ct. [T. C.]*, 550; *Barthgate* agt. *Haskin*, 59 *N. Y.*, 533; *Felt* agt. *Tiffany*, 11 *Hun*, 62; *Martin* agt. *Windsor Hotel Co.*, 10 *Hun*, 304; *Dittenhoefer* agt. *Lewis*, 5 *Daly*, 72; *Daily* agt. *Gescheidt*, 9 *Reporter*, 254).

Under the rule sustained by these authorities the order made was not authorized. It should therefore be reversed, with costs to abide the event.

All concur.

SUPREME COURT.

OLIVER W. BUCKINGHAM and another, plaintiffs, appellants,
agt. JOHN A. SWEZEY and another, defendants; SETH M.
MILLIKEN and others, respondents.

Attachment — Warrant against interest of debtor who is a copartner where his firm is insolvent — Lien of attachment against property of copartner other than firm property — Refusal to discharge such attachment merely because no lien on firm property — Attachment allowed to remain for whatever it is worth against property of individual partner — Subsequent attaching creditors; Code Civil Procedure, § 682.

Where the plaintiffs in an action against two defendants, who were copartners, obtained a warrant of attachment against the property of one copartner only, and another firm of subsequent attaching creditors in another action against the same defendants, applied for and obtained an order of special term vacating such warrant of attachment on the ground that it appeared on the argument of the motion to vacate, that the warrant of attachment was issued against the property of one defendant only, on the ground that he had absconded; also, that the firm against whom the action was brought was insolvent and unable to pay their debts in full:

Held, the attachment cannot be discharged merely because no lien on the firm property had been thereby acquired; plaintiffs are allowed to retain their attachment in such case for whatever it is worth.

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Held, also, that neither the cases of *Donnell agt. Williams* (21 *Hun*, 218); and *Staats agt. Bristow* (73 *N. Y.*, 264), supports the point "that in an action against a firm consisting of two members, if a warrant of attachment be granted against one upon a debt due by the firm, and the firm is insolvent, the interest of the party proceeded against is nothing and no lien is thereby acquired."

Donnell agt. Williams explained, and *Staats agt. Bristow*, distinguished.

First Department, General Term, May, 1881.

APPEAL from special term order vacating attachment.

This is an appeal from an order of special term vacating an attachment upon the application of subsequent attaching creditors, Milliken and others.

Plaintiffs were copartners in the business of selling domestic cotton goods, Leonard street, in the city of New York. Defendants were similarly engaged. The firm of Milliken & Co. were also in the same business in the same city. Plaintiffs brought this action against defendants, and obtained an attachment. Milliken and others also brought another action against the same defendants.

The attachment obtained by plaintiffs herein was against the property of defendant Swezey alone and on the ground that he was an absconding debtor. The motion by Milliken and others to vacate assumed that the attachment was granted against the property of both defendants, and upon the ground that they were both alleged to be non-residents. The moving affidavits were directed to such erroneous suppositions. The facts that defendant Swezey had forged heavily; had left his business and his family and absconded from and remained beyond the jurisdiction of the court, were shown to have been facts of public notoriety, undisputed, admitted by his copartner, his wife and his social and business friends, at and before the time the attachment was issued. No opinion was given or filed in the court below, but the order recites as follows: "And it appearing on the argument that the warrant of attachment was issued only against the property of the defendant Swezey, on the ground that he had absconded, and

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leave being thereupon granted to argue the motion on the ground that at the date of granting of the warrant of attachment the firm of Swezey & Dart herein was insolvent and unable to pay their debts in full, it is," &c., "Ordered, that the warrant be vacated." It also appears that "the defendant Swezey left property in this city to the extent and value of upwards of fifty dollars." The court at special term vacated the attachment in the action of Buckingham and Paulson, subsequent attaching creditors, and from that order an appeal was taken to the general term.

Chauncey B. Ripley, on behalf of appellants Buckingham and Paulson, Jr., made and argued the points following :

I. The ground that "the firm was insolvent at the date of granting of the warrant," is not tenable. "Plaintiffs were entitled to retain their attachment as to the individual property of the defendant (Swezey) for whatever it was worth, and the court could not discharge it absolutely merely because no lien upon the firm property had been thereby acquired. The court might, had the attachment been against the firm, set it aside as against Dart, and leave the law to take its course (*Donnell agt. Williams*, 21 *Hun*, 216, 219). Such is declared to be the law by the prevailing opinion of the general term of this court (*Id.*, 219); and the opinion suggesting an opposite view (*Id.*, 218), was not approved by a majority of the court. The order vacating the attachment in *Donnell agt. Williams* (*supra*), was sustained, but on other grounds; *Staats agt. Bristow* (73 *N. Y.*, 264) is there held not to apply where the attachment is against the individual property of one member of a copartnership, as in this case.

II. The granting of the motion in the court below on a ground not suggested by any of the moving papers, and of which plaintiffs had no notice whatever, was in disregard of the express provisions of the statute (*Code Civil Procedure*, sec. 780), and of the rule of this court (*Rule 37*); it is not an approved practice, because it deprives one party of all

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opportunities for preparation on his part, and opens the door for unjust advantage to his adversary. Compare *Fry* agt. *Bennett* (16 *How.*, 385, 396); *Miller* agt. *Kent* (60 *How.*, 388, 389).

III. The attachment of the respondents was void, under their theory, on the same ground recited in the order appealed from, as appears by the papers (*fol.* 9, *p.* 4; *fol.* 4). If the so-called subsequent lien of Milliken and others was no lien, then they had no standing in the court below; the provision allowing a subsequent attaching creditor who has acquired a lien to apply to vacate, contemplates a valid lien of necessity (*Code Civ. Pro.*, *sec.* 682); and under the familiar rule of practice that he who commits the first error should not prevail, the order below should be reversed (*People* agt. *Booth*, 32 *N. Y.*, 397), even if respondent's theory is correct.

IV. The order below should be reversed with costs below, and costs and disbursements of this appeal.

John J. Adams (attorney and of counsel) for subsequent attaching creditors, respondents.

I. The warrant of attachment was granted against the property of Swezey only, and the firm of which he was member having made an assignment of their property, there was no interest that was subject to levy under the warrant. In an action against a firm consisting of two members, if a warrant of attachment be granted against one of the members upon a debt due by the firm, and the firm is insolvent, the interest of the partner proceeded against is nothing, and no lien is acquired thereby (*Donnell* agt. *Williams*, 21 *Hun.*, 218). This result has been distinctly declared in the case of *Staats* agt. *Bristow* (73 *N. Y.*, 264).

II. It is immaterial that the motion is made on behalf of subsequent attaching creditors (*Blossom* agt. *Estes*, 10 *Weekly Dig.*, 428).

III. The order vacating the attachment was properly granted and should be affirmed.

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BRADY, J.—The attachment obtained by the plaintiffs, Buckingham and Paulson, Jr., was against the property of the defendant Swezey alone, and on the ground that he was an absconding debtor. Milliken and others who were subsequent attaching creditors moved to discharge the attachment and were successful. No opinion was delivered when the motion was decided, but the order declarative of the judgment of the court contained the following, which seems to be a statement of the grounds on which the court rested:

“And it appearing on the argument that the warrant of attachment was issued only against the property of the defendant Swezey, on the ground that he had absconded, and leave being thereupon granted to argue the motion on the ground that at the date of granting of the warrant of attachment *the firm of Swezey & Dart herein was insolvent* and unable to pay their debts in full, it is,” &c., “*ordered* that the warrant be vacated.” And the point presented by the respondent’s counsel is, that in an action against a firm consisting of two members, if a warrant of attachment be granted against one upon a debt due by the firm, and the firm is insolvent, the interest of the party proceeded against is nothing, and no lien is acquired thereby. And he assumes that the legal proposition applicable to a question, such as presented herein, and entitling his clients to have the attachment vacated, was enunciated in the case of *Donnell* agt. *Williams* (21 *Hun*, 218), sustained by the case of *Staats* agt. *Bristow* (73 *N. Y.*, 264). That case is not in favor of his clients, however. Justice BARRETT wrote the prevailing opinion of the court, inasmuch as justice DAVIS concurred with him, and it was said, in his opinion: “Were the case free from other difficulties the plaintiff Donnell would be allowed to retain his attachment as to the defendant Burnie for whatever it was worth, and we could not discharge it merely because no lien on the firm property had been thereby acquired.”

Justice DAVIS having concurred in this view, as already

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suggested, it is considered to be controlling on this appeal, and the order appealed from must therefore be reversed.

The case of *Staats* agt. *Bristow* (*supra*), which was referred to in the case of *Donnelly* agt. *Williams* (*supra*), and also by the respondent on this appeal, is not in point upon the question before us. The court of appeals in that case declared that a purchaser, under an execution against the right, title and interest of a partner in the partnership assets, against whom an attachment had been issued, the firm being insolvent, acquired nothing by the purchase. And it would seem, from the opinion delivered, that the execution considered pointed at property which the defendant had at a time subsequent to the issuing of the attachment and the levy under it, namely, the 9th of December, 1874, and subsequent also to the assignment made by the firm for the benefit of their creditors, which was made intermediate the issuing of the attachment and the execution, namely, on the 4th of December, 1874, the attachment having been issued on the 30th November, 1874. Whether the intervention of the assignment had any controlling influence upon the court it is difficult to say, from the examination of the report of that case; but, nevertheless, it is not an authority for the proposition that the attachment should be discharged under the circumstances disclosed in this case.

The order should be reversed, with ten dollars costs and the disbursements; but, under the circumstances, to abide the event.

I concur, CHAS. DANIELS.

De Nobele agt. Lee *et al.*

N. Y. SUPERIOR COURT.

EDOUARD DE NOBELE and FELIX VANVERSTICHELEN, curateurs of the estate of JOHN PFEFFER & Co., plaintiffs and respondents, agt. STEPHEN LEE *et al.*, defendants and appellants.

Complaint—when should be made more definite and certain—Conditions precedent, how pleaded—Pleading foreign judgment—Code of Civil Procedure, sec. 533—Whether this section applies to foreign judgments or judgments of any other state doubtful.

Where plaintiffs claim the right to maintain the action in some representative capacity conferred on them by some foreign tribunal, and that the cause of action passed to them by virtue of their appointment and by virtue of the operation of the laws of a foreign country:

Held, first, that these matters constitute traversable facts as to which defendants should have definite information.

Second, it is doubtful whether section 533 of the Code of Civil Procedure applies to foreign judgments or judgments of any other state.

General Term, June, 1881.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

APPEAL from order denying defendants' motion to have the allegations contained in the first paragraph of the complaint made more definite and certain.

Childs & Hull, for appellants.

Evarts, Southmayd & Choate, for respondents.

FREEDMAN, J. — Whether section 161 of the Code applies to foreign judgments or judgments of any other state, has been doubted (*Hollister* agt. *Hollister*, 10 *How.*, 532; *McLaughlin* agt. *Nichols*, 13 *Abb.*, 244); and as section 533 of the Code

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of Civil Procedure is simply a re-enactment of section 161 of the preceding Code, the doubt equally attaches to that. I do not deem it necessary, however, to decide the question, as there are other considerations for which the motion should have prevailed to some extent, at least. The plaintiffs' cause of action is not on a foreign judgment against the defendants. The plaintiffs claim the right to maintain the action in some representative capacity conferred on them by some foreign tribunal, and that the present cause of action, if any, passed to them by virtue of their appointment and by virtue of the operation of the laws of a foreign country. Their allegation is, "that heretofore and on or about the 10th day of November, 1880, the plaintiffs were, by the proper courts of Belgium, appointed curateurs of the estate of the firm of John Pfeffer & Co., who were then and had theretofore been residing and doing business in Ghent, in said Belgium; such courts having jurisdiction of the said firm of John Pfeffer & Co. and of the matter of the appointment of curateurs of their estate, and such appointment as curateurs as aforesaid was thereupon duly accepted by the said plaintiffs; and that the plaintiffs, as such curateurs, on or about the 10th day of November, 1880, became, and have ever since been and now are, vested with all the assets and estate of such firm of John Pfeffer & Co., including all claims and demands of whatsoever nature due or owing to them, and including the claims and demands in favor of said John Pfeffer & Co. against the defendants hereinafter mentioned." This is not a sufficient statement of the nature of the proceedings in the course of which the appointment was made, nor of the nature of the judgment or determination by which the appointment was conferred, nor of the title of the court that gave the judgment or made the determination, nor of the place where the said court was located or held its sittings, nor of the jurisdiction of the said court to entertain the proceeding which terminated in the appointment. These matters, under the peculiar circumstances of the case, constitute traversable facts as to which

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the defendants may well claim definite information before answering. Their claim in these respects is a substantial right, and to this extent their motion should have been granted.

The order should be reversed, with costs, and defendants' motion granted in conformity with the foregoing views.

SUPREME COURT.

THE PEOPLE *ex rel.* THOMAS FLYNN, appellant, agt. WILLIAM BUTLER, respondent.

Mechanics' lien — Right of lienor to moneys deposited with county clerk to remove lien

Where moneys are deposited with the county clerk to remove mechanics' lien upon certain lands, it does not confer an absolute right in the lienor to receive the money without first establishing his lien.

First Department, General Term, May, 1881.

APPEAL from an order of the special term denying motion for *mandamus* to compel the county clerk to pay over money deposited with him to remove mechanics' lien on certain lands.

Evarts & Secor, for appellant.

Jefferson Clarke, for respondent.

DAVIS, *P. J.* — The sole purpose of the provisions of the act allowing the payment of money into the hands of the county clerk in cases like this seems to be to remove the lien from the hands of the party and impose it upon the money, the object being to enable the owner of real estate, by substituting money to the amount of the alleged lien, and of costs, if an action be pending, to enjoy the power of disposing of

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his land relieved from the lien. The money takes the place of the lien to await the result of such proceedings as may be taken to establish a lien. This is distinctly settled, and we have no doubt correctly, in *Dunning agt. Clarke* (2 E. D. Smith, 535). The opinion of INGRAHAM, first judge, in that case discusses and settles, as it seems to us, the questions involved in this. That case arose under the laws of 1851, and some changes have been made in the phraseology of the section on which this question arises by the general act of 1880. We do not think, however, that the legislature intended to change the effect of the deposit, or to recognize and declare an absolute right in the lienor to receive the money without first establishing his lien.

The order below should, therefore, be affirmed, with costs.
All concur.

SUPREME COURT.

THOMAS F. CHAPMAN agt. THOMAS ALFRED NICHOLS and others.

Construction of will — Vesting of interests.

The testatrix gave real estate to executors, in trust, to receive and divide the rents and profits equally between her two sons, A. and B., and her grandson C., until C. should become of age; the property to be then divided in three equal shares, one share each, to be conveyed to A., B. and C., but in case C. should die before such division and conveyance, without issue, then the whole estate was to be divided between and conveyed to the two sons. The testatrix died in 1876. Her son A. died in 1879, intestate, without issue; and her grandson C. died in 1880, intestate, under age, and without issue; his father, the plaintiff, being his sole heir.

Held, that at the time of his death, A. was vested with an interest in the real estate by the terms of the will, and that upon his death his share went to his brother B. and nephew C., and that the plaintiff, the father of C., as the heir of his son, takes his share, which is one-half of one-third of the estate.

Special Term, April, 1881.

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Moore, Hand & Bonney, for plaintiff.

Jacob F. Miller, for defendant.

VAN VORST, *J.*—By the terms of the will of the testatrix, the real estate was given to her executors, in trust, to receive and collect the rents, issues and profits thereof, and after paying taxes and other necessary charges, to divide the residue of the rents and profits, equally, between Thomas Alfred Nichols and Theodore J. Nichols, the two sons of the testatrix, and her grandson, Clarence I. Chapman, until Clarence should come of age; and then, upon the further trust upon Clarence coming of age, to divide the real estate into three equal parts, and to grant and convey one equal one-third part to her son Thomas Alfred in fee, one-third part to her son Theodore in fee, and the remaining one-third part to her grandson Clarence in fee, provided that in case he should die before such division and conveyance, without leaving issue him surviving, then the whole of the estate was to be divided and conveyed to the two sons of the testatrix, their heirs and assigns forever. The testatrix died in 1876. Clarence, the grandson, died intestate in 1880, under age and without issue, and his father, the plaintiff, is his sole heir-at-law.

By the express terms of the will the only interest of the grandson, Clarence, in the property, up to his death, was his proportion of the rents and profits which the executors were directed to collect and pay over. He was only entitled to a share in the real estate upon a division, which was directed to be made after he attained full age. If he died before that time, the interest which he was to receive on such division, was directed to be conveyed to the two sons of the testatrix. But before the death of Clarence, and in the year 1879, Theodore J. Nichols, one of the sons of the testatrix, died intestate, leaving no issue, but leaving, as his only heirs-at-law, his brother Alfred and his nephew Clarence, the only child of a deceased sister.

The question to be determined is whether, at the time of

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his death, Theodore J. Nichols was vested with an interest in the real estate of the testatrix by the terms of the will. For if he had such interest, upon his death, it passed to his surviving brother Thomas Alfred and his nephew Clarence, his only heirs, share and share alike. And to the interest of Clarence, if any, the plaintiff, his father, succeeded upon the death of his son.

It is claimed by the learned counsel for the plaintiff that upon the death of his mother Theodore J. Nichols had, by the terms of the will, a vested interest in one-third of the real estate devised, which might be increased one-half in case the grandson failed to reach full age, and that the plaintiff, the father of Clarence, has succeeded to one-half of such interest, or to one-quarter of the estate. Notwithstanding the gift of the legal title to the executors for the purposes of the trust, and the authority in them to collect and apply the rent and income up to a certain time, the ultimate right of Theodore J. Nichols to the enjoyment of at least one-third of the real estate was dependent upon no contingency whatever. At a period fixed — the arrival at age of the grandson of the testatrix — the trust was to end, the estate of the trustees was completed, and the share of each was to be received in actual possession; and in the event of the death of the grandson before that period, the unfettered enjoyment of the estate by the sons of the testatrix would earlier begin.

The view that interests vest in legatees and devisees at the death of the testator is favored, unless there be something in the will which clearly indicates that they shall not vest until a later period. (*Jarman on Wills*, 5 *Amer. ed.*, vol. 2, pp. 406, 407.)

It would seem that the gifts to Theodore and Thomas, the two sons, were in substance and effect absolute, and by no event to be defeated. The death of one without issue did not give the share of the one dying to the survivor, but, by the terms of the will, upon the division to be made, his share would go to his heirs and assigns.

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The only share with respect to which any contingency was annexed was that of Clarence; and upon his death before arriving at full age, it was to go to the two sons of the testatrix; so that while the shares of the two sons, as given, could not fail, they might be increased. But the interest in this expectancy was not a vested or inheritable estate, and the interest of Theodore therein terminated with his death.

In opposition to the view that the two sons had a vested interest in the real estate at the death of the testatrix, it is urged by the learned counsel for the defendant that the testatrix had given the legal title to the executors, as trustees, and that the title was to remain in them until the division was made. But that is preferring the form to the substance. The title was so placed the better to carry out and perfect the gifts. The donees were severally *in esse*, are distinctly named, and the share of each is determined. It is quite true that they were not actually to receive their shares until the estate carved out in favor of the trustees was ended in the manner designated; yet no one can doubt as to what the testatrix intended, and that the provisions of the will were for the immediate advantage of the sons absolutely, and the grandson contingently. The substantial fruits of the gifts, in so far as income was concerned, was given to them immediately. The two sons were the trustees, and they were authorized and empowered, until the division, to collect and divide the rents between themselves and the grandson (*Everitt* agt. *Everitt*, 29 *N. Y.*, 75; *Moore* agt. *Lyon*, 25 *Wend.*, 119). It is also true that there were no words of immediate gift of distinct shares, except as indicated by the directions to divide and convey; nor do I think it was at all necessary that such words should have been used to carry out the evident intentions of the testatrix.

When Clarence should arrive at full age the trustees were to convey distinct shares to the donees in fee simple. I apprehend that this amounts to a gift in *præsenti*. The deeds or conveyances, if any were in fact necessary to be executed, would but effectuate the prior gifts.

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In *Weston* agt. *Weston* (125 *Mass.*, 268) the property was "to be conveyed" on the death of a life tenant, yet it was held that the devisees had a vested interest from the testator's death.

The case would doubtless be otherwise if the rights of the two sons to any portion of the principal of the estate was dependent upon some contingency which might not happen. But there is here no obstacle of that nature. The gift to each son is the substance of the will, in so far as they are concerned; the term of the full enjoyment only was postponed, which no event within the contemplation of the testatrix could defeat. Hence I conclude that upon the death of Theodore his share went to his brother and nephew; and that the plaintiff, the father of Clarence, as the heir of his son, takes his share, which is one-half of one-third of the estate.

In *Manice* agt. *Manice* (43 *N. Y.*, 303, 368) the rule on the subject of vesting was formulated by RAPALLO, J., who says: "And it may be laid down as a general rule that where, by a will, shares or interests in real or personal estate to be ascertained by a division are given * * * the estate or interest of the devisee or legatee in the property to be divided is a vested interest before the division * * * unless the language of the will clearly and unequivocally expresses an intention that the vesting shall be postponed."

There is nothing in the will which tends in any degree to show that the testatrix did not intend that the interests of her sons should be vested interests at her death, unless it arises from the fact that the trustees had been clothed with the legal title up to the period or event when the division was to be made. But that fact does not prevent the immediate attaching, at her death, of the interest which she had absolutely given to them and which inevitably took effect in possession at the termination of the trust estate.

It is suggested by the defendant's counsel that the testatrix did not mean that any portion of her estate should go out of her own family, nor that the heirs of her grandson should

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receive any portion thereof. The intentions of the testatrix are reflected only by the terms of the will properly construed.

In *White* agt. *Howard* (46 *N. Y.*, 144) a result was reached seemingly in opposition to the intentions of the testator, for the heirs of his daughter took a considerable portion of the estate in opposition to the heirs of the testator. This result was reached upon the ground that the remainder of the estate was vested in her at his death. And where a testator fails otherwise to dispose of any portion of the estate, as was said by the learned judge in that case, "the heirs and next of kin are by law entitled to the property, and any intention of the deceased, however ascertained, can have no effect upon their legal rights."

Judgment must be given directing the construction of the will and the rights of the parties as above indicated, the details of which are specially indicated in the findings of facts and conclusions of law herewith filed.

N. Y. COMMON PLEAS.

ELLEN McQUIEN agt. DONALD McQUIEN.

Divorce—Support, maintenance, &c., of wife and children, how to be enforced—Reference to ascertain amount of alimony due—Husband cannot be compelled to pay fees of referee—Code of Civil Procedure, secs. 1772, 1773–1779.

Whilst an action of divorce is pending, and before judgment, the husband may be required to furnish money to enable the wife to pay the fees of the referee and take up the report.

But after judgment of divorce has been rendered the court has no power summarily to compel the husband to furnish the wife the means to carry on a new litigation.

If the husband does not pay the money which the judgment of divorce awards for the support of the wife she may resort to the remedies provided by sections 1772 and 1773 of the Code of Civil Procedure. In prosecuting those remedies the divorced wife cannot look to her former

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husband to advance the means of carrying on proceedings to enforce the judgment.

Where an absolute divorce was granted to the wife and a certain amount a year alimony was awarded to her, a portion of it being paid the first year, and the second year but a small portion being forthcoming, she instituted proceedings to compel its payment, and the court directed a reference to ascertain the amount of alimony due. The defendant failing to appear for cross-examination, an adjournment was granted on his stipulating to pay the referee's fees for the sitting and twenty-two dollars. On the adjourned day, the stipulation not being complied with, the defendant's direct testimony was stricken out and the referee reported in favor of plaintiff. Motion was made by plaintiff that defendant be compelled to pay the referee's fees on taking up the report; and defendant moved that the matter be sent back to the referee:

Held, that the motion to compel the husband to pay the referee's fees should be denied.

Held, further, that if the defendant will pay the referee's fees, and the twenty-two dollars which his counsel agreed to as the terms of the adjournment, the matter will be remitted to the referee, otherwise the motion will be denied.

Special Term, June, 1881.

ELLEN McQUIEN secured an absolute divorce from her husband Donald in 1879, in a suit in the court of common pleas, and was awarded about \$1,000 a year alimony. She gave a receipt in full for \$312 for the first year, in consideration, as defendant claims, of receiving the money in advance; but, as she insists, because she was deceived by her counsel, Mr. Gibbs, her intention being to give a receipt only for the sum named on account. The following year but a small portion of the alimony was forthcoming, and plaintiff instituted proceedings to compel its payment, and also \$688 arrears of the previous year. The court directed a reference to ascertain the amount of alimony due. The defendant failing to appear for cross-examination, an adjournment was granted on his counsel stipulating to pay the referee's fees for the sitting and twenty-two dollars. On the adjourned day, the stipulation not being complied with, the defendants direct testi-

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mony was stricken out and the referee reported in favor of plaintiff. The latter then moved that defendant be compelled to pay the referee's fees on taking up the report, and defendant moved that the matter be sent back to the referee.

McGregor & Steele, for plaintiff.

Goff & Pollock, for defendant.

VAN HOESSEN, *J.* — Whilst the action is pending, and before judgment, the husband may be required to furnish money to enable the wife to pay the fees of the referee and take up the report (2 *R. S.*, 148, *sec.* 58; *Schloemer* agt. *Schloemer*, 49 *N. Y.*, 82; *Code Civil Procedure*, *sec.* 1769). But nowhere is power given to the court summarily to compel the husband, after judgment of divorce has been rendered, to furnish the wife with the means of carrying on a new litigation against him. If the husband does not pay the money which the judgment of divorce awards for the support of the wife, she may resort to the remedies provided by sections 1772 and 1773 of the Code. In prosecuting those remedies the divorced wife cannot look to her former husband to supply her with the sinews of war, for the reason that the statute has not conferred upon the courts any power in the premises. She is no longer a wife; she has got her judgment and special facilities for enforcing the payment of it. Before the divorce the law presumed that she had not the means of prosecuting her case and obtaining justice, and therefore it was that the statute gave the courts power to compel the husband to supply her with the money necessary to carry on her suit. When she has obtained judgment that she be paid a certain sum for her support, she has the opportunity of sequestrating her husband's property, and imprisoning his person if he fails to obey the decree. These advantages were doubtless deemed an ample security; and for that reason, I presume, the legislature has not provided that the husband shall advance to the

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wife the means of carrying on proceedings to enforce the judgment. The parties are no longer husband and wife, but judgment creditor and judgment debtor, and the creditor is left to the remedy which the statutes give for collecting what is due to her. The motion to compel the husband to pay the referee's fees is denied. The motion of the defendant to send the matter back to the referee, to take the cross-examination of the defendant and the testimony of Mr. Gibbs does not commend itself to favor. After reading the extract which has been furnished me from the referee's minutes, and the affidavits of Mr. Goff and Mr. Steele, the impression left on my mind is that McQuien was experimenting with the referee, and attempting, by pleading poverty, to get out of the payment of the money which his counsel agreed should be paid as a condition of the adjournment. He said that he could not pay, that he was utterly unable to raise the money, and, not until the referee had decided that the matter should be closed because the terms agreed upon had not been complied with, did he make the first suggestion that he could produce the money in an hour's time. If he had asked for time before the matter had been decided against him it would doubtless have been granted. He knew before the decision was made that he could get the money in an hour, but he did not offer to get it until he had found that his experiments upon the good nature of the referee were unsuccessful. Such proceedings ought not to be encouraged. If the defendant will pay the referee's fees, and the twenty-two dollars which his counsel agreed to as the terms of the adjournment, the matter will be remitted to the referee. Otherwise the motion will be denied, with ten dollars costs.

Matter of One Hundred and Thirty-eighth and other streets.

COURT OF APPEALS.

In the Matter of opening ONE HUNDRED AND THIRTY-EIGHTH AND OTHER STREETS.

New York (city of)—*Proceedings for opening streets*—*Appeal from confirmation of report of commissioners of estimate, does not lie to court of appeals*—*Report of commissioners, to what extent final*—*How proceedings to be set aside.*

An appeal to the court of appeals does not lie from an order of the supreme court confirming the report of commissioners of estimate and assessment in proceedings to open streets in the city of New York.

The report of the commissioners is final and conclusive as to the amount of awards for land taken and the assessments for benefit, but not as to the regularity or validity of the proceedings.

Where the proceeding is wholly unauthorized by law, a motion may be made to vacate and set it aside.

Argued May 31, 1881, decided June 14, 1881.

THIS was a motion to dismiss the appeal, taken by the mayor, aldermen and commonalty of the city of New York, from an order of the general term which confirmed the report of commissioners of estimate and assessment made in proceedings taken to acquire title to One Hundred and Thirty-eighth and other streets in the Twenty-third and Twenty-fourth wards of the city of New York.

James A. Deering, for motion.

David J. Dean, for mayor, &c., appellants, opposed.

EARL, J.—This is a proceeding to acquire title to certain lands in the city of New York for the opening of certain streets under chapter 604, Laws of 1874, and other statutes, upon the application of the commissioners of the department of public parks. Commissioners of estimate and assessment

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were appointed under the act chapter 86 of the Laws of 1813, by which the proceeding is regulated. The application was upon due notice as required by law, and does not seem to have been opposed. A hearing was had before the commissioners thus appointed and they made their report. The corporation counsel of the city of New York appeared at the special term of the supreme court and objected to the confirmation of the report on behalf of the city, on the ground that the act under which the park commissioners claimed to act in applying to the court for the appointment of commissioners, to wit, chapter 604 of the Laws of 1874, is unconstitutional and void, and that, therefore, the proceeding should be dismissed. The court overruled the objection, and confirmed the report. The city then appealed from the order of confirmation to the general term, and there the order was affirmed, and then it appealed to this court.

This motion is now made to dismiss this appeal on the ground that the order is not appealable to this court, and we are of opinion that the motion should be granted.

It is provided in section 178 of the act of 1813 that the report of the commissioners, when confirmed, "shall be final and conclusive," and this language has been repeatedly held to preclude an appeal to this court (*Matter of Commissioners of Central Park*, 50 N. Y., 493).

It is conceded by the learned counsel for the city that the report of the commissioners, when confirmed, was final and conclusive as to the amount of award for land taken and the assessments for benefits, but he claims that it was not final and conclusive as to the constitutional question raised by him, and he is undoubtedly right (*See opinion of ANDREWS, J., in the Matter of Lange, recently decided in this court*).

The report of the commissioners was final only as to the matters which they were called upon to determine. They had no right to pass upon any questions relating to the regularity or validity of the proceeding, or the constitutionality of the act under which the proceeding was instituted, and such

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questions, therefore, remain unaffected by their report, and the confirmation makes the report final only as to the matter submitted to the commissioners and by them determined. Hence, no constitutional question was involved in the orders made below, and none is brought here by this appeal, and for this conclusion the reported case above cited is also authority.

We do not determine whether or not the constitutional question was involved in the order appointing the commissioners, or the effect of that order, as there had been no appeal from it, and it is not brought up for review by this appeal. Unless the city is concluded by that order, it may raise the constitutional question when it shall be sued for the awards, or any attempt is made to enforce them. There is probably another way in which the city can present the constitutional question and that is by motion to vacate and set aside the entire proceeding on the ground that it was wholly unauthorized by law, and for such a motion the case of *Matter of the City of Buffalo* (78 N. Y., 362) would seem to be authority.

The appeal should be dismissed, with costs.

All concur, except FOLGER, Ch. J., absent.

SUPREME COURT.

SIMEON M. GALLUP, as executor, and another, agt. HELEN M. WRIGHT and others.

Construction of will — Latent ambiguity — Extrinsic evidence.

The testatrix, who left a niece, Fanny R. Gibson, and a grandniece, Fanny Gibson, mother and daughter, gave \$1,000 "unto my grandniece, Fanny R. Gibson:"

Held, that this constitutes a case of latent ambiguity or equivocation, as to which extrinsic evidence was admissible to prove which of the persons were intended by the testatrix; and as the mother was the nearest of kin to the testatrix, a presumption arises that she was intended.

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By force of the positive direction in the will to the executors, to sell the real estate of the testatrix and convert the same into cash, there was an equitable conversion of the real estate into personalty at her death.

Special Term, June, 1881.

ACTION for construction of will of Caroline C. Sherwood.

Lord, Day & Lord, for plaintiffs.

William A. Boyd, guardian *ad litem*, for infant defendants.

E. L. Lowe, for defendant Margaret Malloy.

Olin T. Ackley, for defendant Fanny R. Gibson.

Joseph Auerback, for defendants.

VAN VORST, J. — By force of the ninth paragraph of the will, which contains a positive direction to the executors to sell the real estate of the testatrix, and to convert the same into cash, there was an equitable conversion of the realty into personalty at the death of the testatrix (*Taylor agt. Dodd*, 58 N. Y., 335; *Prentice agt. Janssen*, 79 N. Y., 485; *Power agt. Cassidy, Id.*, 602, 613). In addition to the absolute direction to sell, such disposition is necessary to effectuate the gifts and legacies which are chargeable thereon, and payable out of the proceeds. Some of the legacies are in terms made payable out of the proceeds of the estate. That includes both the real and personal property (*Taylor agt. Dodd, supra*). But all the legacies which are payable in money are, in effect, chargeable on the whole of the estate, real and personal. The residuary clause gives and devises "all the rest, residue and remainder of my estate, both real and personal." There could be no rest, residue and remainder of real estate unless something had been taken from the entirety. That something is the legacies. This conclusion is well sustained by authorities (*Tracy agt. Tracy*, 15 Barb., 503; *Reynolds agt. Reynolds*, 16 N. Y., 261; *Shulters agt. Johnson*, 38 Barb., 80; *Forster agt. Civill*, 20 Hun, 252). In

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case of a failure to realize sufficient to pay all the legacies in full, the unpreferred legacies must proportionately abate.

I adhere to the view which I expressed on the argument — that Margaret Malloy is entitled to receive from the executors, out of the proceeds of the estate, the sum of \$300, in addition to the sum of \$1,000 given to her.

An important question arises as to who is to take the gift of \$1,000 created by these words: "I hereby give and bequeath unto my grandniece, Fanny R. Gibson, the sum of \$1,000."

The testatrix left a niece, Fanny R. Gibson, and a grandniece, Fanny Gibson. The former is the mother of the latter, who was an infant of the age of three years at the death of the testatrix. A claim is interposed to this legacy on the behalf of both mother and daughter. It will be seen that neither mother nor daughter fully answer the description.

This constitutes a case of latent ambiguity or equivocation; and the extrinsic evidence offered was proper to be received and considered. The general rule is undoubtedly that extrinsic evidence of the testator's intention is inadmissible in explanation of a will; but to this rule there are exceptions, and the present case is within the exceptions. When the object of the testator's bounty is described in terms which are applicable indifferently to more than one person, evidence is admissible to prove which of the persons was intended by the testator (*Wigram's 7th Proposition on Extrinsic Evidence*; *Reynolds* agt. *Robinson*, 82 N. Y., 103, 107).

The testatrix left no grandniece bearing the name of Fanny R. Gibson, but she left her surviving a niece of that name. Her grandniece, as already observed, was named Fanny Gibson. Which of the two was intended to receive the gift?

In favor of the claim of the mother, Fanny R. Gibson, it may be well urged that as she was nearer in kin to the testatrix than her infant daughter Fanny, a presumption arises that the testatrix intended the former (*Smith* agt. *Smith*, 1 *Edw. Ch.*, 192). This consideration is, however, outside the question of extrinsic evidence.

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Mrs. Sarah E. Reed, a sister of the testatrix, and the grandmother of Fanny Gibson, has testified that her daughter, Fanny R. Gibson, was a favorite niece of the testatrix; that the testatrix had very little acquaintance with or knowledge of her grandniece Fanny Gibson, never having seen the latter but two or three times, and then when she was a young child.

It also appears that Fanny R. Gibson has two daughters. The eldest, who is in her seventeenth year, was named after her uncle, Judge SHERWOOD, and her aunt Sherwood, the testatrix," who was often at her aunt's house, and was a favorite there. Yet no mention of this child is made in the will, and the mother is also wholly ignored, unless this legacy of \$1,000 was designed for her.

Again, it appears by the evidence of Mrs. Reed that after the will was executed the testatrix said to her, "I have given your daughter Fan. \$1,000; I do it to please you." This declaration of the testatrix must be accepted as clear evidence that the niece of the testatrix, Fanny R. Gibson, is the person to whom the legacy of \$1,000 was given, and that she is entitled to receive the same.

This disposes of all the questions raised in respect to the construction of the will, and judgment is ordered accordingly.

SUPREME COURT.

DANIEL H. BALDWIN, appellant, agt. ANNABELLA S. PERRY,
respondent.

Supplementary proceedings — What judge may entertain the proceeding — Code of Civil Procedure, section 2434.

The supreme court is not deprived of jurisdiction in cases of supplementary proceedings by section 2434, of the Code of Civil Procedure.

First Department, General Term, July, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

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APPEAL from order in proceedings supplementary to execution.

C. F. Wells, for appellant.

E. T. Rice, for respondent.

DAVIS, *P. J.* — The motion in this case was disposed of by the court below upon the single ground which is stated in the order as follows : "It is ordered that such application be and the same is hereby denied, on the ground that under section 2434 of the Code of Civil Procedure this court has no jurisdiction in supplementary proceedings."

The learned judge at special term in a brief note assigned the following as the reason for his decision : "Motion denied on the ground that by the decision of Mr. justice DONOHUE it was held that this court has no jurisdiction in cases of supplementary proceedings."

It is apparent that none of the suggestions of irregularity or insufficiency of the papers on which the motion was founded, now presented by the respondent's counsel, were considered and passed upon by the court below. We think it our duty to confine our decision to the single question upon which that court passed.

Section 2432 of the Code provides for three distinct remedies by proceedings supplementary to execution against property ; and section 2434, under which the question in this case arises, specifies the judge before whom such proceedings may be instituted and conducted. Its language is as follows : "Either special proceeding may be instituted before a judge of the court out of which, or the county judge or special county judge of the county to which the execution was issued ; or, where it was issued to the city and county of New York from a court other than the marine court of that city, before a judge of the court of common pleas for that city and county. Where the execution was issued out of a court other than the

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supreme court, and it is shown by affidavit that each of the judges before whom the special proceeding might be instituted as prescribed in this section, is absent from the county, or for any reason unable or disqualified to act, the special proceeding may be instituted before a justice of the supreme court. In that case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made or warrant issued by him must be returnable to a justice of the supreme court, residing in that district, or the county judge, or the special county judge of that or an adjoining county, as directed in the order or warrant." We are at a loss to see any difficulty in ascertaining the true sense and intention of this section. It was intended to confer jurisdiction in either of the proceedings specified in section 2432 upon the judges of the several different courts, and to define the cases in which such jurisdiction might be exercised by some of them. To do this it first declares in very general terms that either special proceeding may be instituted before a judge of the court out of which the execution was issued.

This broad language embraces every court of record authorized to enforce its judgment by execution against property, and the phrase "judge of the court" is used, as it is in various other sections of the same title, in its general sense, and without regard to the question whether the title of such judge is technically that of justice or judge. This general power to institute the proceeding, conferred upon a judge of the court out of which the execution was issued, is nowhere limited by the section. But provision is afterwards made in some cases which are specified for the further conduct of the proceedings before another judge. The same clause of the section provides also that either special proceeding may be instituted before "a county judge or special county judge of the county to which the execution was issued." This power also is general, and in all counties of the state where the office of county judge or of special county judge exists, such judge is clothed with authority to institute the proceeding when-

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ever the execution is issued to his county. But this latter provision would not affect the city and county of New York, because in that city there is no county judge or special county judge, and so it was thought necessary to provide that the judges of a local court, standing in place of the county judges or special county judges of other counties, should be clothed with the same jurisdiction. It was, therefore, enacted that where the execution was issued to the city and county of New York, from a court other than the marine court of that city, a special proceeding may be instituted before a judge of the court of common pleas for the city and county of New York. This undoubtedly gives to the judges of the court of common pleas power to institute supplementary proceedings in all cases where the execution has been issued to the city and county of New York from any court other than the marine court of that city. Jurisdiction of proceedings founded upon judgments of the marine court are left to be enforced by the judges of that court under the power conferred by the first clause of the section, which declares that either special proceeding may be instituted before a judge of the court out of which the execution was issued. But with that exception, the section gives a general power to the judges of the court of common pleas in all cases of judgments upon which the execution is issued to the city and county of New York. The exercise of that power may be restricted somewhat by questions of residence and personal jurisdiction, as specified in subsequent sections, but those questions are not now under consideration.

The next section provides for cases where the execution is issued out of a court other than the supreme court, and it is shown that each of the judges before whom the proceeding might be instituted, as prescribed in this section, is absent from the county, or for any reason unable or disqualified to act. In such a case it is provided that the proceeding may be instituted before a justice of the supreme court. The objects of this provision are too plain to require comment.

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The residue of the section provides for cases where the justice of the supreme court, before whom the proceeding is instituted in the case just mentioned, does not reside within the judicial district embracing the county to which the execution was issued. In that case the order made by him must be returnable to a justice of the supreme court residing in that district, or to the county judge or special county judge of that or of an adjoining county as may be directed in the order. The system of section 2434 seems to be very plain. It is to confer power to institute the proceedings. First. Before any judge of any court out of which the execution was issued. Second. Before any county judge or special county judge of any county to which the execution was issued. Third. Before any judge of the court of common pleas in and for the city and county of New York when the execution was issued to the city and county of New York out of any court other than the marine court of that city; and, Fourth. To provide for cases where the execution is issued out of a court other than the supreme court, and each of the judges before whom the special proceeding might be instituted, as previously prescribed in the section, is absent from the county, or for any reason unable or disqualified to act, by authorizing the proceeding in such cases to be instituted before a justice of the supreme court, and directing where the subsequent steps in the proceeding shall be taken in cases in which the party proceeded against does not reside within the judicial district embracing the county to which the execution was issued. All the various parts of the section are harmonious and consistent with each other, and offer no occasion for construction or, as it seems to us, for reasonable doubt.

In the case before us the action was in the supreme court; execution had been issued and returned, and proceedings supplementary taken, under which a receiver was appointed in that court.

The learned judge was, in our opinion, fully authorized by the Code to grant the motion made before him. The decision

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upon which he relied in denying the motion was erroneous, and for that reason the order must be reversed, with ten dollars costs and disbursements.

SUPREME COURT.

In the Matter of ISADORE BAYARD.

Constitutional limitations upon local legislation — Cruel and unusual punishments.

A general law for the administration of justice, either civil or criminal, which professes to be for the government of the whole state, must operate equally upon all.

A statute is not in accordance with an instrument under which courts are established, and their grades fixed, which undertakes to clothe a local and inferior judicial tribunal with power to punish a crime against the general criminal code of the state with more severity than is possessed by those of higher and general jurisdiction; and it is equally clear that special statutes, which arbitrarily, and without the existence of any public need therefor, punish any offense under a general law of the state, when committed in a locality, or part of a locality, or by particular individuals, with a greater penalty than when committed elsewhere in the same county and state, or by others, are certainly destructive of the equal rights of citizens under the law, which equality is our protection as well as our pride; and the attempt to make the gravity of punishment of a crime depend upon the exact spot of its commission, and not upon the degree of criminality, as shown by the attending circumstances, is repugnant to any just theory upon the administration of criminal justice.

When a state has, by a general law, created a crime and fixed the maximum of its punishment, a special statute operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition of *section five of article one* of the constitution of the state as to "cruel and unusual punishments."

The power which the charter of the city of Cohoes (*Laws of 1876, chap. 440, as amended by Laws of 1880, chap. 456*) has attempted to confer upon its recorder cannot be upheld, because it is subversive of the

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principles of our fundamental law; and it also violates an express constitutional provision.

When the general law has in plain words declared what shall be the maximum of punishment for a particular crime all over its jurisdiction, and has thus proclaimed the adequacy and sufficiency of the penalty thereby imposed for the offense, a special statute, which excepts from the operation of the general law a small portion of the state and gives to a local magistrate within such excepted district power to inflict double that punishment for the same crime, when committed therein, cannot be upheld, and must be declared void, because it authorizes the infliction of a cruel and unusual punishment.

Albany, Special Term, June, 1881.

APPLICATION by *habeas corpus* to discharge Bayard from confinement in the Albany Penitentiary.

Arthur E. Valois, for prisoner.

D. Cady Herrick, for People.

WESTBROOK, *J.*—Isadore Bayard was tried and convicted at a court of special sessions, held in the city of Cohoes, by the recorder of said city, of the crime of petit larceny, and upon such conviction was sentenced to the Albany Penitentiary for the period of nine months.

The question which this proceeding involves is: Had such court the power to impose so long a period of imprisonment?

The Revised Statutes of the state (*vol. 3, p. 969, sec. 1, 6th edition*) enact: "Every person who shall be convicted of stealing, taking and carrying away the personal property of another, of the value of twenty-five dollars or under, shall be adjudged guilty of petit larceny, and shall be punished by imprisonment in a county jail *not exceeding six months*, or by a fine not exceeding \$100, or by both such fine and imprisonment."

By the charter of the city of Cohoes (*chap. 440 of Laws of 1876*), the recorder of the city is clothed with "all the powers of justices of the peace in towns, or of courts of

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special sessions held by justices of the peace in towns in all criminal cases and matters, and such other and additional powers as are hereinafter conferred upon him."

The act to which reference has just been made, by its next section (*the 29th*), after giving to the recorder jurisdiction in certain criminal cases, and also over "all offenses triable by courts of special sessions in towns," further declares: "When any person charged with any crime or offense, jurisdiction of which to hear and determine is conferred upon said recorder by this section, or shall be charged with habitual drunkenness or disorderly conduct, shall be brought before such recorder, such recorder shall, upon conviction of such offender, have power to punish by fine not exceeding \$250, or by imprisonment in the Albany Penitentiary, at hard labor, for a term not exceeding one year, or by both such fine and imprisonment."

Under the act of 1876, it was held by judge OSBORN (*In Matter of Margaret Shike*), that the increased punishment provided for by the act did not apply to a case where the general statute limited the power of punishment by imprisonment to a term of six months.

By chapter 456 of the Laws of 1880, however, the charter of the city of Cohoes was again amended, and it must now be conceded that, so far as the legislature has power so to do, it has given to the recorder of the city of Cohoes authority to punish to the extent provided for by the act of 1876, in "all crimes and offenses over which said recorder is given jurisdiction by the act, when convicted within the city of Cohoes." As by the same amended section (*section 1 of the act of 1880, amending section 29 of the act of 1876*), the recorder is expressly clothed with power to try "all offenses triable by courts of special sessions in towns and in cities of this state," and as such courts of special sessions (*vol. 3 R. S. [6th ed.], 1004, sec. 1*), have jurisdiction to hear and determine "all cases of petit larceny charged as a first offense," it follows if the act of 1880 is within the constitutional power of the legislature, this sentence must be upheld.

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It is certainly repugnant to every fundamental principle of justice that the laws of the state should prescribe different degrees of punishment for the same offense against a general law in different localities thereof—that the gravity of the penalty for a crime, confessedly committed within the borders of the same state and of the same county, must depend upon the exact spot of its perpetration, and not upon any circumstance adding to its degree—and that a petit judicial officer should be clothed with greater power to punish for certain crimes under and against the general law than is conferred upon the highest criminal courts. And yet precisely this has been attempted by the law under consideration, and if it can be upheld then inferior courts and officers can be clothed with more power than those which are superior, and discriminations in punishment can also be made between portions of single localities (as this law has in fact done in the county of Albany), and even as between individuals, by legal enactment. It is possible that no express constitutional prohibition prevents such legislation, but it certainly is contrary to the whole theory and spirit of our organic law, and therefore as much forbidden in fact as though prohibited by express words (*People ex rel. Bolton agt. Albertson*, 55 N. Y., 50 [see 55]). It surely needs no argument to prove that a statute is not in accordance with an instrument under which courts are established, and their grades fixed, which undertakes to clothe a local and inferior judicial tribunal with power to punish a crime against the general criminal code of the state with more severity than is possessed by those of higher and general jurisdiction; and it is equally clear, that special statutes, which arbitrarily, and without the existence of any public need therefor, punish any offense under a general law of the state, when committed in a locality, or part of a locality, or by particular individuals, with a greater penalty than when committed elsewhere in the same county and state, or by others, are certainly destructive of the equal rights of citizens under the law, which equality is our protection as well as our pride;

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and the attempt to make the gravity of punishment for a crime depend upon the exact spot of its commission—whether it is committed a foot on one side or the other of an imaginary line drawn upon the ground—and not upon the degree of criminality as shown by the attending circumstances, is repugnant to any just theory upon the administration of criminal justice.

In what has been said, it has not been stated that a law applicable to a locality only, will not be valid. There are very many of that character which would be upheld. The spirit of our constitution, however, is opposed to them (*Sec. 18 of art. 3 of our state constitution*). What is claimed is, that a general law for the administration of justice, either civil or criminal, which professes to be for the government of the whole state, must operate equally upon all. For (as was said by JACKSON, J., in *Holden agt. James*, 11 *Mass.*, 396 [see 405]), “it is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits or actions from which all others, under like circumstances, are exempted.” These words were penned in regard to a special act which exempted the plaintiff in an action from the operation of the general statute of limitations, and the conclusion therein reached was again affirmed in *Picquet, appellant* (5 *Pick.*, 65), and is, as it seems to me, clearly sound. It shocks the moral sense to engraft an exception upon the general law of the state either in favor of or against an individual, whether such exception refers to a civil or criminal remedy. All persons within the jurisdiction of the general public law of the state owe to it the same allegiance, and as all incur in the violation of the same provision, a like guilt, all should be liable to an equal penalty. And what is true in regard to a law for the government of a state is equally applicable to one for the government of a locality.

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They must both operate equally upon all who are subject to their authority. The former must compel obedience to its mandates by penalties which are uniform all over its territory, and the latter, if it attempted to enforce good order in a city by a statute, could not subject the inhabitants living upon one side of a street to a punishment for its violation, which, either in degree or kind, should differ from that imposed upon the residents of the other side under the same circumstances. Discretion in the infliction of punishment, by fixing its maximum and minimum, may be confided to a court, but the legislative enactment must be so framed as to secure equality to all who are subjected to its provisions and who may be liable to its punishments. The vice of the Cohoes act does not consist in the fact that a special criminal statute applicable to it, and to no other part of the county of Albany or of the state of New York, of both of which it forms a part, has been enacted, but that a general law of the state, in the violation of which within its city limits, an individual incurs no more guilt than by its violation elsewhere, is there made to operate with double severity. No special enactment enlarging or defining the crime of petit larceny, if committed within the city of Cohoes, has been passed. An individual committing that crime within its borders is guilty of no offense against a special police law or regulation governing that locality only but of one defined by the general statute, the punishment whereof, if perpetrated within the city limits, is made exceptionally severe. If legislation of such a character can be maintained, our criminal code can become a piece of variegated patchwork. Violations of the same general statutes creating a crime can be punished differently in every locality; and a law, for the government of a locality only, may be so framed as to favor some, and oppress others; and according as the exact spot of the offense may happen to be, the penalty to the offender can be more or less grave. The life of the criminal may depend on scientific measurements to locate the deed for which he is to suffer; and even the right

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to inflict punishment at all may turn upon the ability of some local and inferior court to try the cause and to pronounce judgment. To argue upon the validity of such a law is useless. A statement of what can be done, if it is valid, is more forcible than refined reasoning.

The power, then, which the charter of the city of Cohoes has attempted to confer upon its recorder, cannot be upheld, because it is subversive of the principles of our fundamental law. And it also, as will next be attempted to be shown, violates an express constitutional provision.

By article 8 of the Constitution of the United States, it is provided, that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;" and by section 5 of article 1 of the constitution of our state, it is declared: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." Though the provisions of both the federal and state constitutions are cited, it is the latter only which is applicable (*Pervear agt. Commonwealth, 5 Wallace, 475, 476*). The language in both is almost identical, and the same restriction is placed upon the legislature of the state in the punishment of crime as is imposed upon congress. It is difficult by a general definition so to define the phrase "cruel and unusual punishments" as to cover its entire meaning. That which in the judgment of one man is cruel, may not seem to be so to another, and that which is unusual to the sight of one individual is quite usual to that of another. To determine, then, whether punishment is or is not cruel and unusual, there must be some standard by which it should be judged; and it seems but just to hold, that when a State has, by a general law, created a crime and fixed the maximum of its punishment, that a special statute, operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein

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or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition. Let us apply this proposition to the case before us. The general law of the state has defined the crime of petit larceny, and, as hereinbefore shown, has also prescribed and fixed the limit of imprisonment, upon a conviction thereof, at six months, which penalty therefore is the usual and common punishment of the offense within its borders, and such fixing of the maximum of punishment is also a legislative declaration that such maximum is an adequate and sufficient penalty for the offense wherever committed. When the recorder of the city of Cohoes is allowed to punish, and does punish for the same offense by an imprisonment for the term of nine months, has he not inflicted a cruel and unusual punishment? Is not a sentence, when no circumstance of atrocity, nor violation of public or private rights has magnified the crime for which it is imposed, "*cruel*," which adds one-half to the maximum of punishment permitted by the general law of the state, and "*unusual*" because not the usual or ordinary one imposed? These questions, as has been previously stated, are to be answered not by the mental standard of an individual mind, but by that which the state has itself made by its general law fixing its character and maximum. Any other mode of reaching a conclusion would be varying and unsatisfactory, and a wise and wholesome constitutional enactment would or would not protect, according as the individual judgment of a judge should conclude. No such uncertainty in the operation and application of the fundamental law should be tolerated when certainty upon such a question is attainable. Acts are startling only by comparison. The punishments inflicted by barbarous nations are neither cruel nor unusual when judged by their standards, and they become so only when measured by the more humane one of civilization. Nay, in some of the states of our union there have been and now are statutes prescribing punishment, which the almost universal judgment of our commonwealth would pronounce

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“cruel and unusual,” and yet such statutes have there been upheld (*See Aldridge agt. Commonwealth, 2 Va. Cases, 447*). Evidently, then, the law of the state of New York, prescribing punishments for crimes committed within a certain locality must be judged by its own general standard. Its right to change such general standard is unquestioned, but its power to select localities or individuals for greater and more severe penalties than can be inflicted elsewhere and upon others is most emphatically denied because of the constitutional provision to which reference has been made. When the general law has in plain words declared what shall be the maximum of punishment for a particular crime all over its jurisdiction, and has thus proclaimed the adequacy and sufficiency of the penalty thereby imposed for the offense, a special statute, which excepts from the operation of the general law a small portion of the state, and gives to a local magistrate within such excepted district power to inflict double that punishment for the same crime, when committed therein, cannot be upheld, and must be declared void.

I am aware that it has sometimes been argued that the prohibitions in our federal and our state constitution, which have been discussed, refer to the *kind* and not to the *degree* of punishment. Such a limitation, however, upon the language, does not seem to me sound. It ignores the fact that punishment, ordinary in its general character, may by excess become “cruel and unusual,” and is, therefore, as much forbidden as those unknown to our criminal code. From what source, however, emanates the line of thought combated? It is impossible, as has already been said, for human ingenuity to suggest penalties for crime, which the laws of some country have not enforced. The education of the individual by the laws of the state in which he lives has created his standard and inspired his construction; and the rule of judicial judgment adopted in this opinion, that the validity of a local penal statute, when the constitutional objection we are considering is urged, must be determined by the general law of the state,

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is the identical one which he has followed in his interpretation of the constitution. A citizen of New York, accustomed only to punishments by fine, imprisonment and death, might view with horror some of those allowed by the laws of our sister states; and when he pronounces the latter "cruel and unusual," he has only spoken as the laws of our commonwealth have instructed him. If then, it may be asked, it is just to pronounce any punishment for crime "cruel and unusual" because not of a *kind* to which we have been accustomed, and therefore shocking to our moral sense, why is the same rule unsound when the *extent* thereof is to be judged? If the standard of judgment is correct as to the one, it must be as to the other; and whilst the right to change such standard by a law applicable to the whole state is conceded (subject of course to the constitutional limitation, to be then applied by the enlightened judgment of its judiciary), yet the right to depart therefrom in a single locality by the attempt to inflict therein either a punishment strange and unknown to its general law, or one which in severity doubles its general maximum, is most emphatically denied.

The case of *Williams* agt. *The People* (24 N. Y., 405), has not been overlooked. It is true that a statute, operating only in the city and county of New York, which made the offense of stealing from the person, without regard to the amount taken, punishable as grand larceny, was held not to be obnoxious to the particular objection in that case made, to wit, that it violated article 3, section 16, of our constitution, which provides that "no local or private bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title;" but it is also true that none of the propositions which have in this case been discussed were therein raised, nor did the case so glaringly present them. No attempt was made by the New York statute to punish the crime of petit larceny when committed within its limits, by double penalties, but it raised that offense, when committed under certain circumstances, to that of grand

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larceny, and a violation of its provisions was the breach of a special local police act, rather than one of general law. The act did no violence to the fundamental rule, that the gravity of punishment must depend upon the gravity of the offense, and of its attending incidents, nor was jurisdiction of the offense and the enforcement of its penalties confined to a local and inferior court. The act was aimed at a crime more prevalent in a large city than elsewhere, and whilst it must be conceded that to a certain extent, at least, it is liable to some of the objections herein made, yet none of them were taken or discussed. It is, therefore, not decisive of the present case, and the argument to be derived from the fact that if the positions herein taken were sound, they would have occurred to court or to counsel, is weakened by the consideration, that the injustice of that act was not so manifest as that of the present, and valid objections do not always present themselves to the most acute intellect. Whatever force too, any of the arguments herein used would have had if made on the trial of the Williams case, they must also have been materially weakened at the time of the decision by the court of appeals, in June, 1862, by the fact that on the nineteenth day of April, of the same year (*chap. 374 of the Laws of 1862, sec. 2*), a precisely similar statute had been passed covering the entire state.

The questions discussed are very important, and I regret that I have been unable to devote more time to their consideration, but it seems to me clear that local courts cannot be created with power to punish crimes against and under the general law of the state more severely than is allowed to those of general jurisdiction, without violating both the spirit and the letter of the fundamental law of the state. It cannot, it seems to me, be lawful to punish by death certain offenses against the general public law of the state, when committed in certain localities, provided the trial is by some special, local and inferior court, when the same punishment for the same offense cannot be imposed elsewhere in the commonwealth, nor even in the same locality, when brought before the highest

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tribunal of the state. Such legislation, by its attempt to elevate the inferior court above its constitutional superior — by making the extent of punishment for crime depend upon the *locus* of the offense, and not upon its own character, or that of the attending circumstances — and by reason of its obvious discrimination is repugnant to the intent and general principles of our constitution; and its selection of localities and of individuals for the infliction of double the punishment which can be imposed elsewhere and upon others, for the same offense in every particular, makes it also liable to an objection founded upon that clause of the state constitution which forbids the infliction of “cruel and unusual punishments.”

N. Y. SUPERIOR COURT.

WILLIAM S. WILLIAMS agt. THE WESTERN UNION TELEGRAPH COMPANY and others.

RUFUS HATCH agt. THE WESTERN UNION TELEGRAPH COMPANY and others.

Extra allowance — When and how allowed — Code of Civil Procedure, section 3253 — The word “involved” as used in this section, means “affected.”

The word “involved,” as used in section 3253 of the Code of Civil Procedure, means “affected.”

Where the plaintiff claimed that the defendant, the Western Union Telegraph Company, had no legal right to the property of the American Union Telegraph Company, and the defendant claimed it was the legal owner of the property, and the court sustained its claim :

Held, That the title of the defendant to this property was affected by this judgment, and an extra allowance to defendant may be computed upon the value of such property, as “the subject-matter involved.”

The fact that plaintiff, on obtaining an injunction, gave an undertaking to pay damages suffered by the party enjoined if the injunction should not be sustained, does not deprive defendant of the right to an extra

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allowance, though such allowance may be considered by the court on the assessment of damages upon the undertaking.

The fact of the entry of judgment is not a waiver of the right to costs and allowances, though an extra allowance cannot be granted after the taxation and entry of costs in a judgment.

Special Term, July, 1881.

TRUAX, J.—The prevailing party in a difficult and extraordinary case is entitled to an extra allowance of an amount not to exceed five per centum upon the sum recovered or claimed, or the value of the subject matter involved (*Code of Civil Pro.*, sec. 3253).

The above entitled actions were difficult and extraordinary actions, and the prevailing parties are entitled to an allowance, if there was a sum claimed in the complaint, or if the value of the subject-matter involved can be estimated. The object of these actions is to be ascertained from the nature of the relief asked for in the complaint. The plaintiff in the Williams case demanded, among other things, that the defendants, other than the Western Union Telegraph Company and the Union Trust Company, be adjudged and decreed to pay to the Western Union Telegraph Company the sum of \$15,526,590, or such portions thereof as should be distributed among the stockholders without payment in cash therefor. The sum claimed against the defendants, other than the two companies, was \$15,526,590, or such portions thereof as was distributed among the stockholders without payment in cash therefor. The evidence offered on the trial of these actions shows that this last amount was more than \$40,000.

The plaintiff, Hatch, demanded in his complaint that the defendant, the American Union Telegraph Company, be enjoined from delivering to the Western Union Telegraph Company certain property that it had sold for \$15,000,000 to that company, and that the Western Union be enjoined from receiving said property and from paying for it; and also that it be enjoined from paying to its stockholders a certain stock dividend of \$15,526,590, as provided in the agreements men-

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tioned in the complaint, and that said agreements to be adjudged to be invalid, illegal and void. This was also a part of the relief demanded in the Williams case.

What is the subject matter involved in this action? Is it not, among other things, the property of the American Union Telegraph Company? The plaintiff claimed that the defendant, the Western Union, had no legal right to such property; the defendant on the other hand claimed that it was the legal owner of the property, and the court sustained its claim. The title of the defendant to this property was affected by this judgment (*Atlantic Dock agt. Libby*, 45 *N. Y.*, 505). This property, the court has found, was worth \$15,000,000.

There have been quite a number of adjudications upon the meaning of the words "subject-matter involved." The following are some of the more important of these adjudications:

Burke agt. Candee (63 *Barb.*, 552) was an action brought for the purpose of having certain deeds of land declared to be mortgages, and that it be adjudged that the defendant hold the title as trustee. The referee to whom it was referred reported against the plaintiff, and held that the lands were free from any trust. A motion was made at special term for an extra allowance, and the court held that an allowance should be granted and that the basis of the estimate of the allowance was the value of the property directly affected by the judgment, that being the subject-matter involved (*See also Coleman agt. Chauncey*, 7 *Rob.*, 578).

Comens agt. Board of Supervisors of Jefferson County (64 *N. Y.*, 626) was an action brought to enjoin the defendants from levying any tax upon certain property for the purpose of paying the principal or interest of certain bonds which the plaintiff alleged had been illegally issued. The complaint was dismissed and an extra allowance was granted by the special term. The court of appeals held that the court below did not exceed its jurisdiction. The opinions of the general and special terms in this case can be found in 3 *T & C.*, 296.

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Sickles agt. *Richardson* (14 *Hun*, 110) was an action brought to have 3,574 bonds of a railway company declared invalid and void, and to have them delivered up and canceled. The court decided that the plaintiff was entitled to the relief demanded in the complaint, and granted an extra allowance of \$2,000. The question involved said judge BRADY, in giving the opinion of the general term, "was whether these bonds were legally issued or not, and that question necessarily involved their value."

Lattimer agt. *Livermore* (72 *N. Y.*, 174) was brought to restrain the defendant from infringing upon an alleged easement. The court of appeals held that in such an action the easement is the subject-matter involved, and therefore its value is the proper basis for an extra allowance.

The Ogdensburg, &c., Railroad Company agt. *The Vermont, &c., Railroad Company* (63 *N. Y.*, 176) was brought to determine the validity of the lease of a railroad. The court of appeals held that the subject-matter of the action was the lease, and that its value and not the value of the road, was the basis on which an extra allowance should be granted.

People agt. *Albany and Vermont Railroad Company* (16 *Abb.*, 465) was brought to compel the defendant to repair and operate its road, and an injunction restraining the defendant from receiving certain property was issued. The general term of the supreme court in the third district, held that an extra allowance was properly granted, and that the value of the property directly affected by the action was the basis on which the allowance should be computed.

From these cases it would appear that the word "involved," as used in that section of the Code, means "affected."

I do not think that the argument of the plaintiff — that the defendants should not have an extra allowance because the plaintiff, on obtaining an injunction, gave an undertaking to pay to the party enjoined such damages, not exceeding the sum specified in the undertaking, as he might sustain by reason of the injunction, if the court should finally decide he was

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not entitled thereto, should be sustained. The damages of the defendants may be more than the sum specified in the undertaking. At any rate, if the defendants are allowed an extra allowance now, the court will consider this extra allowance, if it should be considered, on the assessment of damages upon the undertaking.

The plaintiff contends that no extra allowance can be granted, because the defendants have entered a judgment in each of these actions, and, therefore have waived the right to costs and allowances.

It is well settled that an extra allowance cannot be granted after the taxation and entry of costs in a judgment. The costs in these cases have not been taxed. The judge before whom these cases were tried, directed the clerk to insert in the judgment the costs, when taxed. Section 3262 of the Code of Civil Procedure provides that "costs must be taxed by the clerk. * * * The clerk must insert in the judgment, or final order, the amount of the costs as [when] taxed. In a case where the costs are in the discretion of the court, * * * the decision * * * must specify which party or parties are entitled to costs, but the amount of the costs must be ascertained by taxation."

There can be no judgment until the paper signed by the judge shall have been entered in the office of the clerk of the court. The clerk cannot insert the amount of costs in the judgment until there is a judgment. The adjustment of costs is in strictness, a proceeding subsequent to the entry of judgment (3 *Wait's Prac.*, 720.)

The trial of these actions lasted many days. A large amount of testimony was taken. They were difficult and extraordinary cases. The defendants in each action are entitled to \$2,000.

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SUPREME COURT.

JOHN L. SUTHERLAND, Executor, etc., agt. FRANCES S. CLARK
and others.

Will — ambiguity, construction of words — Intention to control.

The testator devised a house and lot to his wife, and authorized his executors "to pay off any mortgages or other incumbrances there may be on said house and lot at my death, provided the title is in me;" but it appeared that when the testator purchased these premises, in 1874, the conveyance was made directly to his wife, and the title remained in her up to his death. She in the deed assumed payment of a mortgage upon the property. The payment upon the purchase-price was paid by the testator, and he paid the taxes and a portion of the principal of the mortgage, and personally guaranteed the payment of the remainder:

Held, that the testator meant that the executors should pay off this mortgage if the title remained at his death in the condition in which he had placed it.

The questions raised in the answers, upon affairs of administration and payment of legacies, as no questions of doubt arise, are proper matters for legal redress, and are not to be interjected in an action for the construction of a will.

Special Term, June, 1881.

A. Van Sinderen and S. P. Nash, for plaintiffs.

John N. Whiting, for Mrs. Frances S. Clark.

C. B. Alexander and John L. Sutherland, for other defendants.

VAN VORST, *J.*—The eighth clause of the will of the testator, Lot C. Clark, is in these words: "I devise the house and lot No. 30 West Seventeenth street, in the city of New York, to my beloved wife, Frances Sutherland Clark, her heirs and assigns forever; and I authorize my executors to pay off any mortgage or other incumbrances there may be on said house and lot at my death; provided the title is in me."

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The fact in regard to the house and lot in question is that the testator never had title thereto, and in form the devise is inoperative. These premises were originally purchased, in the year 1874, by the testator, and a conveyance thereof was then made by the grantors directly to Frances Sutherland Clark, the wife of the testator, and the title remained in her at all times up to his death. The cash paid on the purchase was furnished by the testator, and all taxes due against the premises were also paid by him, and he kept the premises in repair. At the time of the agreement to purchase there was a subsisting incumbrance upon the property, in the form of a mortgage, amounting to twenty thousand dollars, which, by the terms of the contract, the testator assumed to pay. The contract is dated February 2, 1874. In the deed of the premises to Frances S. Clark, subsequently, and on the 5th of February, 1874, executed, this mortgage was described, and the grantee assumed its payment. The testator, with his wife and daughter, occupied the house up to the time of his death. In addition to the taxes, he also paid the interest on the mortgage, and in the year 1879 he made a payment on the principal sum secured thereby of five thousand dollars. Subsequently, and in the lifetime of Mr. Clark, the testator, and at his instance, this mortgage was assigned to the trustees under the will of Hugh Munro, deceased, and is now held by them. And the testator, by an instrument in writing, executed by him, personally guaranteed the payment of the mortgage, principal and interest. The question arises whether the duty is cast upon the executors, under the will of the testator, to pay the sum remaining due upon this mortgage. The facts above disclosed show clearly enough that the testator designed to pay it himself, and had he lived he would have, without doubt, done so; for when the mortgage was assigned, at the testator's request, to the present owners thereof, upon his being asked if he would have the payment extended three or four years, he said "no; that he did not wish to extend it; that he intended to pay it off within six

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months or a year; he wished to reserve the right to do so; * * * that he would pay it very soon; it might be an inconvenience and trouble to his wife if he should be taken away."

The devise taken as a whole, accompanied as it is with an authorization to his executors to pay off any mortgage or other incumbrance there might be on the house and lot at the testator's death, presents questions of doubt, and necessitates judicial determination, which is aided by the extrinsic facts to which reference has been made. The testator was a lawyer, and must have known that a devise of lands to which he had no title would be inoperative. He evidently intended a substantial benefit to his wife, and would scarcely, in so solemn an act as his last will and testament, delude her with an empty display of bounty. It is barely possible that the testator had forgotten that he had already placed the title to this property in his wife, and supposing it to be in himself made the authorization to the executors, so as to completely perfect the gift to her, discharged of the mortgage. In such case I should conclude that effect should be given to the testator's manifest intention — that the mortgage should be paid by his executors out of his personal estate, which is in any event liable on his covenant of guarantee for any deficiency which might arise should the mortgage be foreclosed and the premises fail to yield a sum sufficient to pay the amount due thereon. But were it otherwise, so that the testator distinctly knew how the title stood when he made his will, it gives place to the idea that he made a useless gift, unless the executors are concerned to pay off this mortgage, as the contemplated donee already owned the house subject to the mortgage.

It is the business of the court to ascertain the testator's intentions, and to give effect to his intentions, so that his testamentary disposition may be substantially effectuated, and that the donee should really receive every benefit the will was designed to bestow and through the means the testator contemplated.

In any view of the case, I cannot avoid the conclusion, under

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all the facts and circumstances proper to be considered in construction, that the testator intended to relieve his wife from the obligation he had imposed upon her through the conveyance of the premises, which contained an obligation on her part to pay the mortgage. The business in regard to such conveyance was wholly transacted by him. His subsequent guarantee of payment of this mortgage, and of its value as a security, at his own instance voluntarily assumed, is clear evidence of his intention to relieve her of its burden. In this view the devise would, in effect, read that his executors should pay off the mortgage if the title remained, at the death of the testator, as it stood when he made his will — that is, if the premises had not been conveyed away by his wife. The testator's affection for his wife had prompted him to cause her to be invested with the title — he meant that she should have it free and clear — and the devise in question, through the direction to the executors to pay the incumbrances makes the testamentary disposition substantial and effective and in harmony with the testator's acts and intentions. Good faith in interpretation and construction means that we take the words of the testator fairly as they were intended. That he meant that the executors should pay off this mortgage if the title remained at his death in the condition in which he had placed it, I cannot doubt ; and hence the construction of the devise is, that they should pay and discharge the mortgage and other incumbrances, if any, existing at his death upon the premises, in the course of the due administration of the estate. And this conclusion is the more reasonable in the light of the fact that, to the knowledge of the testator, his wife had no means to pay off the incumbrance created by the mortgage, except through the premises in question, which he clearly intended as a home ; and that they should be sold to pay off this mortgage, was clearly not intended by him. He did not wish that this mortgage should be “an inconvenience and trouble to his wife if he should be taken away.” And this inconvenience and trouble which he would spare her can

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only be avoided through the payment, by the executors, of this mortgage, as I think the testator clearly meant that they should.

As this is not an action for an accounting in regard to the general administration of the estate, nor for a decree looking to a settlement of all rights and interests, and a distribution of the property among those entitled, it is not important, and I think it quite out of place, to pass upon the questions raised with respect to the tenth and eleventh clauses of the will, concerning the application of the income of certain bonds disposed of by the will. There is nothing ambiguous in the testamentary disposition with respect to this income. The rights of the parties to this income are legal, and no question as to construction arises. And the result is the same in respect to the matters suggested in that portion of the answer of the defendant Hiram C. Clark, called a counter-claim. Neither of these matters are germane to the question of construction arising with respect to the devise of the house and lot to the wife of the testator; in that regard a real difficulty arises, which may well give occasion to an action for construction. Affairs of administration, and payment of legacies, where no questions of doubt arise, give occasion for legal redress, and are not to be interjected in an action for the construction of a will. Besides, such matters are not to be taken up by piecemeal in this action, leaving other duties imposed upon the executors, and rights and interests in others, open and uncared for (*Powell agt. Demming*, 22 *Hun*, 235).

The evidence, in a general way, shows that the testator left means sufficient to satisfy all claims and legacies provided for in his will. And the executors will doubtless discharge their duties towards all claimants in the due and proper administration of the estate, and sedulously guard the interest of all who have been provided for, so that no interest will be overlooked.

All that is proper to be done at this time is to construe the only claim in the will in respect to which doubt or ambiguity is alleged to exist, and that relates to the duties of the executors with respect to the mortgage and incumbrances on the

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house and lot in question. All other rights are to be enforced in the usual way, and, if occasion should require, by an appropriate action, or upon the accounting in the surrogate's court ; and the result reached here is without prejudice to such rights and appropriate remedies.

SUPREME COURT.

In the Matter of the Petition of the RECTOR, CHURCH-WAR-
DENS AND VESTRYMEN OF THE CHURCH OF THE HOLY
SEPULCHRE, to vacate an assessment.

New York (city of) — Assessment for underground drains — When appropriation of lots for drains without compensation illegal — Where the assessed valuation of lots prior to the assessment for underground drains was "nothing" the assessment is properly vacated — Mere figures under heading of "value of real estate" on a tax roll without a dollar mark, do not show valuation.

The commissioner of public works run an underground drain through lots of the petitioners, which had already been thoroughly drained by means of ordinary sewers, for which an assessment had been duly paid: *Held*, that an assessment for such underground drain was properly vacated, the appropriation of petitioner's lots for such drains without compensation being illegal.

Held, also, that the claim that the lots were drained for their own benefit and because it was essential to the public health and welfare, is not sustained by the proof.

Held, further, that such assessment could not be laid because the assessed valuation of the lots prior thereto being "nothing," it was impossible to comply with the law prohibiting an assessment exceeding one-half the value of the property assessed.

Where the valuation in an assessment roll is put merely in figures under the heading of "value of real estate," without anything to indicate whether they represented dollars or cents:

Held, that there is no valuation shown by such assessment roll.

First Department, General Term, October, 1880.

Before DAVIS, P. J., BRADY and BARRETT, JJ.

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APPEAL by the mayor, aldermen and commonalty from an order of the special term vacating an assessment.

The board of revision and correction of assessment lists confirmed, April 9th, 1874, an assessment for building underground drains extending from Seventy-third to Eighty-first streets, and from First to Fifth avenue, and a lien was thereby imposed on petitioners' lots situated on Seventy-fourth street. Petitioners allege that the assessment is invalid and void for substantial errors.

The testimony shows that the drain was constructed on the land of the petitioners, by the commissioner of public works, pursuant to authority conferred by the acts of the legislature, passed in 1865 and 1866.

That the drain was of no benefit to the church lots; that no water or fluids flow from the church lands into the drain; and that said lots are thoroughly drained by means of sewers constructed before the drain was built, and for which the church has paid an assessment.

That no consent was given for the building of said drains on their land by the petitioners, and no compensation had been made, offered or awarded to them therefor. To some part of this proof objection was taken by the corporation, and it was excluded (*See opinion*, LAWRENCE, *J.*). Petitioners also showed that there has been no prior valuation sufficient to sustain the assessment.

The following is the opinion of the special term:

LAWRENCE, *J.* — The witnesses should not have been allowed to express an opinion as to whether the drains were necessary or useful, and the objections taken to such testimony by the corporation counsel are sustained. In other respects, the case seems to fall within the decision of *Cheesebrough* and the cases in the court of appeals which that decision was designed to follow. The assessment must therefore be vacated.

From the order entered vacating the assessment, this appeal is taken by the mayor, aldermen and commonalty.

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William C. Whitney, for corporation.

I. The construction of the drains was necessary for the preservation of the public health. This is shown in the manner provided by the statute of 1871 by the certificate of the sanitary inspector and the resolution of the board of health, and there is no evidence whatever to the contrary.

II. The lands of the petitioners were among those that required to be drained in this manner. The certificate of the sanitary inspector and the resolution of the board of health were *prima facie* proof that all of the lands included within the boundaries named were derelict, as containing surface water, stagnant and deleterious to the health of the vicinity, and it was necessary for the petitioners to overcome the *prima facie* case thus made out. The extracts from the assessment map and the map showing the old water courses, annexed to this brief, show that the petitioners' lands did require draining and were drained in this manner. The presumption created by the action of the board of health was not overcome, and upon the case the petitioners' lands were in a condition requiring drainage for the preservation of the public health.

III. The petitioners' lands being derelict, as matter of law, the city was under no obligation to acquire from them the right to perform that work. In considering the proposition fully, it is necessary to discriminate this from other cases similar only in that they have been cases of drainage which may be pressed upon the court as bearing upon this case. As to the question whether the state has power to authorize a municipality to perform any official act, it is necessary to take the standpoint of the state in conferring the authority, in order to determine whether or not the act is legal. It is well-settled law that the state has the right to cause lands to be drained by the public authorities, and assessments to be imposed therefor upon the land benefited, and that the benefit to the public health is a sufficient public purpose justifying the interference of the state in the performance of the work and the imposition of

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assessments. Of course, in general, the performance of such a work as the drainage of lands necessarily involves the entrance upon and the use of some land not itself requiring to be drained, and it, of course, necessarily follows that the state has no right to enter upon such land, or construct a public work upon it, of any character, without first taking proceedings to acquire the right, and making compensation for the burden thus imposed upon the property by putting it to a public use. That was the point held by the court of appeals in the *Matter of Cheesebrough*, decided in September last.

It was one in which the land before the court did not require draining, was not itself at fault, but was made to bear the burden of assisting to drain its neighbor's land which was at fault. The court says, EARL, J.: "He testified (and his evidence was not disputed) that his land was dry; that it had natural drainage; was in no way benefited by the drains." "It was a work not so much necessary for the lands of the petitioner as for other lands, and requiring drainage through his. It is believed that no case can be found justifying the permanent appropriation of land without compensation under such circumstances," citing *People* agt. *Nearing* (27 N. Y., 306); *People* agt. *Haines* (49 N. Y., 587); *Matter of Rhineland* (68 N. Y., 165); *Matter of Ryers* (72 N. Y., 1). "The statute of 1861, therefore, did not and no statute could confer authority to construct this drain through the land of the petitioner without his consent, and without compensation to him for the land taken. The construction thereof was therefore a trespass, a wrongful act upon his land," &c. It is not claimed in behalf of the city in this case, that the state has any power to enter upon, construct any public work upon, or lay any burden upon any land not itself guilty of wrong, unless compensation is made for the public use. Wherever the public require the use of any land to carry out a necessary public improvement, it must be regularly acquired, and compensation made. But it has never yet been held that the city is powerless to abate a nuisance within its borders; that is, can-

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not interfere and remedy a condition of things dangerous to the health of its people, and charge the expense thereof to the owner of the derelict property, without first proceeding by the tedious method established by the law for acquiring the property, or an easement in it, in order to enable the work to be done.

It is admitted that where it is desired to assess property not itself derelict (by reason of benefits it is supposed to receive from the improvements of the neighborhood) or where it is necessary to enter upon land not itself requiring drainage, for the purpose of constructing any portion of the public work, that in both of those cases the source of the power, and the mode of its execution, must necessarily follow the courses well known to the law as those pursued in the performance of an ordinary public work or public improvement; but the necessity arises from the fact that you propose to lay a burden upon land not itself derelict, to assess owners whose land did not require drainage. But where the state simply proposes to enter upon land guilty of the perpetration of a wrong to the community, the creation and maintenance of a nuisance, for the purpose of relieving the community by removing the nuisance and making the property conform to the conditions necessary for the public health or safety, charging the expense to the property derelict, there is no case to be found denying the power, and the long-established usage of the city, in the exercise of the power; and the many cases in which it has been sustained all support the proposition that it is a legitimate exercise of the police power possessed by the state. This case presents the question squarely, of property itself derelict, and there being no point made that any portion of the drain has been laid upon property not derelict (and therefore where it would be a trespass for the state to enter and carry on work), has not the state a right to authorize local officials, for the sake of the public health, to enter and make the necessary improvements required, and charge the expense of the same to the owners? The case of *Rhineland* and other similar

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cases, holding that the state was a trespasser, and that no assessment could be laid for a sewer thus constructed where the state had no right to construct it, and where the property owed no duty to the public to allow it to be constructed, were, without doubt, rightly decided; but the absurdity of applying the proposition to the case of an entrance by the state upon property guilty of a wrong to a community by maintaining a nuisance, is at once readily discerned. For what is the compensation to be made? Is the owner to be compensated for allowing the state to enter upon his land and removing a nuisance which he has been guilty of maintaining? The state is entering for the purpose of compelling him to perform a duty which he owed to the public, not for the purpose of conducting a public improvement for the benefit of the locality. The state is in the exercise of its police power in so doing (*See Cooley on Taxation*, 402; *Bliss* agt. *Krans*, 16 *Ohio State*, 55; *Sessions* agt. *Crunkilton*, 20 *Ohio State*, 319; *O'Reilly* agt. *The Draining Company*, 32 *Ind.*, 169; *Commonwealth* agt. *Alger*, 7 *Cushing Rep.*, 84).

Elliott Sanford, for petitioners.

I. Proof was offered on the part of the corporation, consisting of an extract from the records on file in the department of taxes, and an extract from the minutes of the board of health. To both of these documents petitioner took exception. To the first as incompetent and inadmissible, and not showing any money valuation; that no oath was shown to have been taken; and to the second, for similar and other reasons.

II. This evidence should have been excluded. The resolution of the board of health was not, so far as the case shows, ever communicated to the commissioner of public works. It is not pretended that the drain was built under the authority of the resolution. It was possibly the intention of the board to send the resolution and certificate to the commissioner of works, but there is no proof of the fact; and the assessment list states on its face that it was built by the commissioner of

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public works under the other statutes. The resolution of the board of health on *ex parte* testimony, that a drain was necessary, is not competent to establish the fact alleged that petitioners' lots were a nuisance or "derelict," or required to be drained (*Clark* agt. *The Mayor*, 13 *Barb.*, 32; *Rogers* agt. *Barker*, 31 *Barb.*, 447). All proceedings affecting the property of individuals must be on notice (*Stuart* agt. *Palmer*, 74 *N. Y.*, 183; *Underwood* agt. *Green*, 42 *N. Y.*, 140; *Yates* agt. *Milwaukee*, 10 *Wall.*, 505). A certificate of the secretary, Storer, is not proof of any fact (*Parr* agt. *Greenbush*, 72 *N. Y.*, 463; *Erickson* agt. *Smith*, 38 *How.*, 454; *Kobbe* agt. *Price*, 14 *Hun.*, 55). It did not show when the valuation was made, and the necessary oath of the assessors was not shown, although required. An assessment roll without an oath is fatally defective (*Bellinger* agt. *Gray*, 51 *N. Y.*, 610; *Merritt* agt. *Portchester*, 71 *N. Y.*, 309).

III. Conceding for the moment that the evidence given in the certificate of Storer is competent, we contend that the "1,000" under the heading of value of real estate is no valuation. The court cannot say that these are dollars or cents. In *Brayley* agt. *Seaman* (30 *Cal.*, 610, 619), the court said, relative to the valuation of lots on a tax roll: "From such assessment roll it appeared that the lot in question was listed and in the column headed with the words 'value of real estate' were certain Arabic numerals with nothing in connection therewith to designate that they represented the quantity or the sum of anything whatever." In *People* agt. *Savings Union* (31 *Cal.*, 132), the court held: "In the assessment roll, in the column headed valuation, there is nothing whatever to indicate what the figures are intended to represent, and under the authorities cited we are not authorized to say that they mean dollars; they are simply numerals, barren figures; * * * or if money be indicated, the denominations may be either eagles, dollars, cents or mills. * * * Neither in the original or duplicate is there anything to indicate what the figures in the column headed valuation was intended to signify,

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and the auditor was no more authorized to call them dollars than the court would be. * * * Clearly then, under the authorities cited, there is no valuation shown by the original assessment or duplicate." In *Lawrence agt. Fast* (20 Ill., 338), CANON, C. J., says: "I do not think we have sunk to so low a degree of uncertainty, nor have we attained such a perfection of intuitive knowledge as to justify us in saying what these figures mean. The figures without denominations are senseless, as would be denominations without figures" (See, also, *Lane agt. Bommelman*, 21 Ill. 143; *Potwin agt. Oudes*, 45 id., 366; *Pittsburg R. Co. agt. Chicago*, 53 id., 80; *Woods agt. Freeman*, 1 Wall., 398; *People agt. Hastings*, 34 Cal., 571; *Randolph agt. Metcalf*, 4 Cald. [Tenn.], 407; *Hurlbut agt. Butenop*, 27 Cal., 50, 57). Until the corporation can show the value placed on petitioners' lots by a money valuation under oath in a book or roll of annual valuations made by the deputy tax commissioner (*sec. 8, chap. 302, Laws 1859*), the assessment cannot be sustained (66 N. Y., 395).

IV. The court below was correct in disregarding these two documents as incompetent proof. The map attached to appellant's brief was not in evidence below. It formed no part of the case and should be disregarded on appeal. On that map other lots are the property of Charles Jenkins, and petitioners' lots are designated by the correct name. The map is not complete, as but one block is given, while, in fact, as already shown, the drain extends through seven blocks and four avenues.

V. There is no proof that the drain was constructed under the act of 1871. The extract from the records of the board of health is dated May 10, 1871, and the case shows that the drain was constructed by the commissioners of works more than two years after that date. The "urgent need" described by the sanitary inspector, on which the police power depends, did not exist in this case, and although the health board may have resolved to request the work to be done under the law

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of 1871, the commissioner chose to do the work apparently under other authority.

VI. The testimony of two of the officers of the church as to whether the drain was useful, was excluded by the court below, and the claim that the order should be reversed for the erroneous ruling of the court in admitting it, is clearly unfounded. These witnesses were competent to testify as to the fact that the church lots were dry and well sewered, and the inference that the drains were useless may well be omitted.

VII. There is no such thing as "derelict" land in this city. Petitioners' land was not "derelict." Three of his lots, as shown on the map attached to appellant's points, are not touched by the drain, while the fourth is, and the same map shows an ordinary sewer constructed in Seventy-fourth street, along petitioners' front, and also a sewer in Seventy-fifth street. If there was need of an underground drain, it could have been constructed along the line of the two streets near the lots, and would have drained as much area as if built in the middle of the block. The sanitary inspector did not certify that all the lands were below the sewer level. He expressly excludes part of them, and petitioners show that their land was not included. There is no power under the act of 1871 to drain any lands not below the sewer level. Petitioners were not guilty of any wrong. The natural water-course was stopped by the building of sewers, streets and avenues by the corporation. This same water-course was obstructed by the city, and they had to pay the damages (*Donohoe* agt. *The Mayor*, 3 *Daly*, 65, BRADY J).

VIII. The court of appeals held (*In re Cheesebrough*) that the statute of 1871 did not, "and no statute could confer authority to construct this drain through the land of the petitioner without his consent, and without compensation to him for the land taken. The construction thereof was, therefore, a trespass, a wrongful act on his land." In this case, also, the drain was built on the land of the petitioner, and there is no material difference whether the drain begins at a point outside

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of and crosses through the land of an individual, or starts at a point in one corner of his land and runs along through it (*Philip* agt. *Thompson*, 1 *Johns. Ch.*, 131).

IX. The land of petitioners was taken for a public use, without their knowledge. They had no notice of the proceeding. They were entitled to notice (*Owener* agt. *Albany*, 15 *Wend.*, 374; *Dyckman* agt. *The Mayor*, 5 *N. Y.*, 434; *Dickey* agt. *Tennison*, 27 *Mo.*, 373; *Purdy* agt. *Martin*, 31 *Mich.*, 455; *Stuart* agt. *Palmer*, 74 *N. Y.*, 183; *Cooley* *Const. Lim.*, 562, 563). Neither a person nor the state can intrude on a person's land save in a lawful manner (5 *Hun.*, 591; 58 *N. Y.*, 416). No compensation having in this case been made, offered or awarded, the drain was unlawfully built. The right to enter does not exist till after payment in full has been made. An entry without payment is a trespass (*Mill on Eminent Domain*, secs. 130, 135, *et seq.*). The counsel for the appellants argues that while it is unlawful to enter on dry land and build a drain, it is not unlawful to enter on moist or wet land and there build a blind drain. That was not the view of the framers of the constitution when it was provided (*sec. 6*) that private property (wet or dry) should not be taken for public use without just compensation by due process of law. No qualification is made whether the owner be deprived by the police power or by eminent domain.

X. The learned brief submitted by the counsel for the appellants herein, relative to the police power is, *ipsisimis verbis*, identical with that presented to the court of appeals *In re Van Buren*. It is impossible that the court of appeals when sustaining the objections taken to that assessment overlooked these pages. In that case the general term vacated the assessment. As a reason why this general term should be reversed this lengthy point was argued on the appeal, as appears from the appellant's points herein. The court of appeals affirmed the order below, and we may justly conclude that if it was tenable the general term would not have been affirmed.

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XI. We contend that the construction of the drain on private land was a trespass and a wrongful act falling within the decisions (*In re Cheesebrough*; *In re Rhineland*, 68 *N. Y.*, 105; *People* agt. *Haines*, 49 *N. Y.* 587). The appellants are not able to distinguish this from the *Cheesebrough case*. The court below was correct, and the order should be affirmed.

BARRETT, J.—This was an application to vacate an assessment imposed upon the petitioners' lots for an underground drain. The drain ran through these lots and was, in part, constructed thereon. The petitioners' lands having been thus appropriated, without its consent and without compensation, the case is brought directly within the principle of *In re Cheesebrough* (78 *N. Y.*, 232), where it was held that land, itself dry and free from nuisance, could not be permanently appropriated for drains for the benefit of other lands, nor even for the general welfare, without compensation.

The learned counsel to the corporation seeks, however, to distinguish this from the *Cheesebrough case* and to apply thereto the police power doctrine. The distinction claimed is that in the present instance the lots were used not merely for the benefit of other lands, but for their own benefit; that such lots lay below the level of the adjacent sewers and were covered with stagnant water; and that consequently the underground drainage of the petitioners' lots was absolutely essential to the public health and welfare. The difficulty is that the facts do not justify the distinction nor bring up the question so elaborately and ably discussed in the brief submitted for our consideration. For example, there is no evidence that the petitioners' lots were derelict.

They are not necessarily included in the certificate of the sanitary inspector, condemning certain lands as dangerous to the public health. This certificate speaks of lands or parts of them within certain boundaries. But the parts are not indicated. An accompanying map is referred to, but it is not

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upon the record. There is, therefore, nothing wherewith to identify the petitioners' lots nor to charge them as nuisances. Upon the other hand, the testimony adduced by the petitioner shows that the lots were not in any way benefited by the drain and that, in fact, these lots had already been drained, and that thoroughly, by means of ordinary sewers (constructed before the underground drain was contemplated) for which an assessment had been duly paid. There was, therefore, no evidence to justify a finding that the condition of the petitioners' lots was such as to jeopardize the health of the neighborhood. Nor could there have been any great emergency nor immediate necessity, since we find that the drain was not constructed for some two years after the certificate of the sanitary inspector was presented to the board of health.

And, further, the work does not seem to have been done under the act of 1871 (*chap.* 566) at all, nor in consequence of either this certificate or the resolution of the board which followed. The assessment list shows that the drain was constructed by the commissioner of public works, pursuant to authority conferred by the acts of 1865 and 1866, while there is "no evidence that the resolution of the board of health (passed under the authority of the act of 1871), requesting the department of public works to drain the land, was ever delivered to or acted upon by that department."

There is another and equally fatal objection to this assessment. It does not appear that, prior thereto, any valuation was ever placed upon the lots in question by the tax assessing officers. *Per contra*, it does appear that from the years 1869 to 1874 inclusive, their assessed valuation was "nothing." It was impossible, therefore, to comply with the provision in the act of 1840 (*chap.* 326, *sec.* 7), prohibiting an assessment exceeding one-half the value of the property, as thus valued, and the case upon that head is thus within the matter of *Second Avenue Methodist Episcopal Church* (66 *N. Y.*, 395).

We have not overlooked the attempt to show such valuation by the certificate of the secretary of the department of taxes

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and assessments. But this certificate, if proof at all, does not show when the valuation was made. *Non constat*, it was subsequent to the assessment for the blind drain. Nor was the assessment list verified by the oath of the assessors. Nor was the valuation put in dollars and cents, but in figures without denomination. Upon both points we think the assessment was properly vacated. The order appealed from should, therefore, be affirmed with costs.

BRADY, J., concurs.

DAVIS, P. J., *dissenting*.—I think the order in this case should be reversed and the matter sent back to the special term for a rehearing, on which rehearing the facts can be more fully and fairly presented. There is danger of doing great injustice to the city without a fuller presentation is made of the facts which ought to determine the questions involved herein.

CHEMUNG COUNTY COURT.

THOMAS SWEET agt. PATRICK FLANNAGAN.

Jurisdiction of county courts—Constitutional law—Chapter 480, Laws of 1880, constitutional.

County courts have jurisdiction of an action brought to recover damages for an alleged assault and battery where the amount demanded is \$2,000. Chapter 480 of the Laws of 1880, conferring jurisdiction upon county courts, where the defendants reside in the county in which the action is brought, when the relief demanded is the recovery of a sum of money not exceeding \$3,000, is constitutional.

MOTION to dismiss complaint on cause being moved for trial, on ground that the county court has no jurisdiction of the cause of action stated in the complaint.

The action is brought to recover damages for an alleged assault and battery, and the amount demanded is \$2,000.

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Charles A. Collin, for plaintiff.

John Moore, for defendant.

SEYMOUR DEXTER, *Chemung County Judge*.—It is insisted that chapter 480 of the Laws of 1880, conferring jurisdiction upon county courts, where the defendants reside in the county in which the action is brought, where the relief demanded is the recovery of a sum of money not exceeding \$3,000, is unconstitutional. So far as we are advised no decision has been made upon the question ; at least none has been reported. The question is an important one, and demands careful examination. Section 15 of article 6 of the constitution provides, among other things :

(1.) "The county court shall have the powers and jurisdiction they now possess until altered by the legislature."

(2.) "They shall also have original jurisdiction in all cases where the defendants reside in the county, and in which the damages claimed shall not exceed one thousand dollars." "And also such appellate jurisdiction as shall be provided by law, subject, however, to such provisions as shall be made by law for the removal of causes into the supreme court."

(3.) "They shall also have such other original jurisdiction as shall, from time to time, be conferred upon them by the legislature."

First. Is there anything in these provisions which expressly prohibit the legislature from extending the jurisdiction of the county court, as provided by the provisions of said chapter 480 ? There can be but one answer to this question, and that in the negative. These provisions contain no words of express limitation upon the power of the legislature touching the question under consideration.

Second. Is there an implied limitation upon the power of the legislature contained in the language used ? The first provision above quoted, preserving to the county courts the powers and jurisdiction they then possessed,

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expressly recognizes the power of the legislature to alter the same — that is, the powers and jurisdiction then possessed by the county courts were continued in the said court, “until altered by the legislature.”

The last provision above quoted expressly recognizes the power of the legislature to confer upon the county courts, such other original jurisdiction as they shall deem wise from time to time.

If the language used implies a limitation, it must be found in the word *other*, and to imply such limitation it must be held that the word “*other*” is used in an exclusive sense, as though the provision read: “They shall also have such other original jurisdiction, differing in the subject-matter from that granted by the foregoing provisions, as shall from time to time be conferred upon them by the legislature.”

It will be noted, in this connection, that such exclusive meaning of the word “*other*,” if it exist, can only have application to the provision conferring jurisdiction where the defendants reside in the county, and the damages claimed do not exceed \$1,000. For the reason as above shown, the provision preserving to the county courts the powers and jurisdiction then possessed, expressly recognizes the power of the legislature to alter the same, and as to its appellate jurisdiction, it is expressly provided that it shall be such “as shall be provided by law.”

The county court being a court of limited jurisdiction and having only such powers and jurisdiction as are conferred upon it by the constitution, or laws framed thereunder, it seems that the jurisdiction of an action in which the defendants resided in the county and the damages claimed was a sum of money exceeding \$1,000, was just as much “*other*” original jurisdiction as the power to grant a divorce or issue a writ of *mandamus*. The word “*other*,” in its usual meaning, is only exclusive in the sense of referring to something not included in what precedes it. It must be conceded that the manner of its use in this provision, does not *necessarily* imply

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a limitation upon the power of the legislature. That the language employed is subject to two constructions, is equally clear.

Third. Finding nothing in the language itself *necessarily* controlling in the construction that shall be placed upon it, we will next examine and ascertain the intent, if we are able so to do, of the framers of the constitution. On referring to the proceedings of the constitutional convention, we find the provision relating to the powers and jurisdiction of the county court as reported to the convention by the judiciary committee, to have been as follows: "The county court as at present existing shall be continued with such original and appellate jurisdiction, as shall from time to time be conferred upon it by the legislature" (*Journal of Proceedings*, p. 804; *Proceedings and Debates*, p. 2592).

Here is an unequivocal expression that the whole subject of what original jurisdiction should be, possessed by the county court, should be left with the legislature, and forms a starting point in ascertaining the intent of the convention. In the consideration of this provision in the committee of the whole, an interesting debate sprung up touching the jurisdiction that should be possessed by the county court. It began upon an amendment offered that "they should have original jurisdiction in all actions of slander, libel, malicious prosecution, assault and battery, false imprisonment, seduction and breach of promise of marriage, and shall also have such other original and such appellate jurisdiction as shall, from time to time, be conferred upon it by the legislature" (*Proceedings and Debates*, p. 2592).

A long discussion ensued touching the advisability of making the county court, by the terms of the constitution itself, one having original jurisdiction of a certain class of cases, or whether the subject should be left wholly to the wisdom of the legislature, as provided by the committee's report. It will be noted that the word "*other*" in the above amendment was used clearly with the intent of leaving in the legislature, power to extend the jurisdiction of the county court as they

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should deem wise. A substitute for this amendment was then proposed, giving original jurisdiction in all cases where the defendants resided in the county and the damages claimed was a sum of money not exceeding \$1,000 (*Proceedings and Debates*, p. 2594).

The purpose of this was to make the jurisdiction general within the limits named, and not confine it to a class of litigation. These proposed amendments were voted down in the committee of the whole, leaving the report of the judiciary committee to stand in that regard (*Proceedings and Debates*, p. 2602).

When the consideration of the report of the committee of the whole came up in the convention, the mover of the substitute above mentioned proposed the following amendment, to be inserted after the word "continued" in place of the committee's report: "And shall have original jurisdiction in all cases where the parties reside in the county in which the damages claimed shall not exceed \$1,000, and also such appellate jurisdiction as shall be provided by law, subject, however, to such provisions as shall be made by law for the removal of causes into the "supreme court, and for limiting appeals from said county court to the supreme court."

Another discussion ensued. Upon the one side it was claimed that it was best to leave the whole matter to the legislature to determine, and upon the other that it was best by the terms of the constitution itself to give certain original jurisdiction. That by so doing it would tend to elevate the character of the court and naturally aid in reducing the number of causes upon the over-burdened circuit court calendar, and would bring first-class talent from among the bar to fill the place of county judge.

There does not appear, anywhere in the discussion, a desire upon the part of any number of the convention to limit the power of the legislature to confer further and greater jurisdiction in the future if they should deem it wise.

The amendment was adopted, but subsequently the last

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clause with reference to limiting appeals to the supreme court was stricken out. But by the adoption of this amendment the power of the legislature had been stricken out. No one seemed to desire that, and Mr. Lapham offered an amendment to be added at the end of the one adopted: "And it shall have such other original jurisdiction as shall from time to time be conferred upon it by the legislature." In speaking in support of his amendment he said: "The amendment which I propose will enable the legislature from time to time, as may be found necessary, to enlarge the jurisdiction of this tribunal, and thus relieve the circuit calendar from the *onus* thrown upon them by the course taken by the convention of 1846." This amendment was adopted without much debate and without division (*Journal of Proceedings*, p. 808; *Proceedings and Debates*, p. 2675-6).

The constitution of 1846 provided that "The county court shall have such jurisdiction in cases arising in justices' courts and in special cases as the legislature may prescribe; but shall have no original civil jurisdiction except in such special cases."

Assuming to act under this provision the legislature had enacted, "That the county court should have jurisdiction of civil actions in which the relief demanded is the recovery of a sum of money not exceeding \$500, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement" (*Sec. 30, old Code*). The court of appeals had held this action of the legislature as unwarranted by the constitution, and the act unconstitutional (*Kundolf agt. Thalheimer et al.*, 12 N. Y., 593). Thus it was settled that under the constitution of 1846 the legislature had no power to confer original jurisdiction upon the county courts in common-law actions.

It is clear that it was the intent of the convention to change the policy of the old constitution with reference to county courts. Did the convention place the sum of \$1,000 in the constitution with intent to make it a constitutional limit which the legislature could not enlarge, or was such limit named

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therein simply because by the terms of the constitution itself, without legislative enactment, original jurisdiction was conferred to that extent, without in anywise intending to limit the power of the legislature in the premises under the general clause before quoted?

Upon a careful examination of the proceedings and debates in the constitutional convention upon the subject, it seems to us clear, that it was not the intent to limit the power of the legislature in the premises, but it was the intent to make them courts of original jurisdiction within the limits named, and give power to the legislature to enlarge it, if in the future it seemed wise so to do. Any other conclusion results in holding that the convention were unwilling to confide to the legislature the power of enlarging the jurisdiction in actions when the relief demanded was a sum of money, but in all other actions and special proceedings were willing to trust the wisdom of the law making power.

Finding nothing in the language employed by them in these constitutional provisions, and nothing in their proceedings or debates to necessarily warrant the conclusion that they were guilty of such inconsistency, we are constrained to hold that they were not and that chapter 480 of the laws of 1880, is constitutional. It is claimed that this conclusion is not in accord with the reasoning of the court in *Landers agt. The Staten Island Railroad Company* (53 *N. Y.*, 450). Such claim would have force if the act under consideration changed the character of the county court from one of local to one of general jurisdiction territorially, but such is not the case; and the case has no application to the question under consideration, but so far as the reasoning of judge ALLEN, in his opinion, has application, it justifies the conclusion reached, that the legislature have power to enlarge the jurisdiction so long as the local character of the court is retained.

Another objection is raised to said chapter 480, namely: That chapter 480 of Laws of 1880, was an amendment to section 1, chapter 467, Laws of 1870; that said section 1, chap-

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ter 467, Laws of 1870, had been repealed by Laws of 1880, chapter 245, and hence did not exist so that it could be amended when said chapter 480 was passed. A complete answer to this objection would seem to be that chapter 245, Laws of 1880, was not to take effect until September 1, 1880, and hence section 1, chapter 467, Laws 1870, was not, in fact, repealed at the time chapter 480, Laws of 1880, was passed. That the passage of chapter 480, Laws 1880, being subsequent to the passage of chapter 245, Laws of 1880, the former (chapter 480) must be held to have modified the effect of the latter (chapter 245) so far as the same are in conflict, and said chapter 480 having been passed subsequent to the new Code, must also be held to modify the provisions of section 340 thereof.

The motion to dismiss the complaint is denied.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE NATIONAL
FIRE INSURANCE COMPANY OF NEW YORK.

Taxation of insurance companies under Laws of 1880 — Company not taxable on its receipts during the five months preceding the passage of act — Not taxable upon premiums received for insurance upon property without the state — nor upon premiums of insurance upon imported goods stored in bonded warehouses.

In an action brought by the state against the defendant, a domestic corporation to recover eight-tenths of one per centum upon the entire amount of premiums received by it on its business done in this state during the six months ending the 1st day of July, 1880. The action being based upon the act (*Laws of 1880, chap. 542*) entitled "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations." The act became a law and took effect immediately:

Held, first, that the act should not be so construed as to levy a tax upon the receipts of the defendant from its business during the five months preceding its passage.

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Second. That the defendant is not taxable upon the premiums received for insurance upon property situate without the state.

Third. That the defendant is not taxable upon premiums of insurance upon goods imported from foreign countries, and stored in bonded warehouses.

Albany Circuit, January, 1881.

William B. Ruggles, deputy attorney-general for plaintiff.

Joseph H. Choate, for defendant.

WESTBROOK, *J.*—This is an action brought by the state against the defendant, a domestic corporation, to recover eight-tenths of one per centum upon the entire amount of premiums received by it on its business done in this state during the six months ending the 1st day of July, 1880.

The action is based upon the act (*chap.* 542, *Laws of* 1880) passed June 1, 1880, entitled “An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,” and upon the fifth section thereof, which provides: “Hereafter it shall be the duty of the president, secretary, or other proper officer of each and every insurance company or association incorporated by or under any law of this state, except life insurance companies, and purely mutual beneficial associations, whose fund for the benefit of members, their families, or heirs, is made up entirely of contributions of their members and the accumulated interest thereon, to make report in writing to the comptroller semi-annually upon the first days of August and February in each year, setting forth the entire amount of premiums received on business done in this state, by such company or association during the six months ending the preceding first days of July and January, whether the said premiums were received in money or in the form of notes, credits, or any other substitute for money, and every such corporation or association shall pay into the state treasury, at the dates aforesaid, a tax of

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eight-tenths of one per centum upon the gross amount of said premiums."

The action presents three questions: First. Must the act be so construed as to levy a tax upon the receipts of the defendant from its business during the five months preceding its passage? Second. Is the defendant taxable upon the premiums received for insurance upon property situate without the state; and, third, is the defendant taxable upon premiums of insurance upon goods imported from foreign countries, and stored in bonded warehouses? These questions will be considered in the order just stated.

It is insisted in behalf of the state that the act speaks as of the day of its passage, June 1, 1880, and that when it says: "*Hereafter* * * * upon the first days of August and February in each year" a report shall be made "setting forth the entire amount of premiums received on business done in this state by such company or association during the six months ending the preceding first days of July and January," such language necessarily includes the business done during the five months preceding the passage of the act. If there were no words of limitation in this section, this construction would seem to be inevitable, and although such a result would work absolute injustice, it might be compelled, for it is undoubtedly within the power of the legislature to give to a law a retroactive operation. Such a construction, however, should not be adopted unless the language of the act necessarily requires it (*Dash* agt. *Van Kleeck*, 7 *Johns.*, 502; *People* agt. *Supervisors of Columbia County*, 43 *N. Y.*, 130; *People* agt. *Supervisors of Ulster County*, 65 *N. Y.*, 300, 306, 307; *Fire Department of West Troy* agt. *Ogden*, 59 *How.*, 21).

The construction claimed by the attorney-general, however, is rendered impossible by the word "semi-annually," which occurs in the section, and which is omitted in the statement just made of the attorney-general's position, as it also was in his submitted brief. The language does not require a report

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to the comptroller upon every first day of August and September after the passage of the act, but such report is to be made "hereafter," that is to say, after June 1, 1880, "semi-annually upon the first days of August and February in each year, setting forth the entire amount of premiums received on business done in this state by such company or association during the six months ending the preceding first days of July and January." In other words, a report is to be made every six months after the passage of the act, "upon the first days of August and February in each year" showing the premiums received "during the six months ending the preceding first days of July and January." There was clearly no report called for on August 1, 1880, because six months had not then expired from the date of the passage of the act. To give effect to all the words of the section, it should be read so as to require the expiration of six months, at least, from the passage of the act before any report is called for, and as on August 1, 1880, that period had not elapsed, the first report due was February 1, 1881. If it be said that this construction causes the state to lose the tax upon the income of the company during the month of June, 1880, it is conceded that this is true, and the answer to that argument is that the one insisted upon in behalf of the people gives to the act not only a retroactive operation, and imposes a tax upon earnings prior to its passage, but it also violates the scheme, and the express letter of the law, by requiring one report two months after its passage, when no provision is made therefor, and plain words require every report to be semi-annual. If the legislature intended that the first report should be made on the first day of August, 1880, it should so have said. It is simply impossible to have a report made "semi-annually," after the passage of a law on June 1, 1880, which shall be rendered August 1, 1880. Six months must elapse before any report is due, and when that time has expired, the next condition of the law must be fulfilled by making it on the first day designated after the expiration of such term, which would be February 1, 1881.

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This construction gives effect to all the language, whilst the other ignores a most important and significant word.

In the discussion of this question, another fact is to be borne in mind. It was conceded upon the trial that the defendant had, when the law under consideration took effect, paid all taxes for the year 1880. Indeed, every corporation to whom the act applies had been taxed for the year 1880. When the legislature used the word, "hereafter," upon which the argument of the attorney-general is founded, it spoke with a knowledge that the corporations for whom a new scheme of taxation was devised, had borne their share of public burdens. Could its members have intended to impose a double tax, by making the word "hereafter" refer to the day of the passage of the act; or did they intend that it should refer to the years to come thereafter? Manifestly the latter, because that construction is not only just, but required by the language used. This is shown by bringing the controlling words of the section in connection, and it would then read thus: "Hereafter, semi-annually, upon the first days of August and February, in each year, it shall be the duty of the president," &c., &c., "to make report in writing to the comptroller, setting forth the entire amount of premiums received on business done in the state by such company or association during the six months ending the preceding first days of July and January," &c. The plain meaning is, that in "each year hereafter," that is to say, in each year after the present year, "semi-annually, on the first days of August and February," a report shall be made as the act provides. No other construction, as has already been said, is possible, if effect is given to the word "semi-annually." The scheme of the act is a semi-annual report in every year thereafter, to be made on the first days of August and February, showing the receipts for the premiums received for each six months of the year preceding the first days of July and January, and to do this "*each* year" after the passage of the act, as its language requires, the first report must be made on or before February 1, 1881. This interpretation

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of the law works no injustice, but on the contrary does complete justice to the state, which has already received the sum due to it for taxes levied for 1880, and it certainly is required to give to every word used its appropriate force.

The case of *Drexel & Co. agt. The Commonwealth* (46 Penn., 31), cited by the representative of the attorney-general, does not sustain his position. The Pennsylvania statute (it was one in regard to brokers and bankers) became a law May 16, 1861, and in direct words required from every broker and banker in the state a return "on or before the first Monday of December next," but although the act required such first report to be made by the time just mentioned, and also one "on or before the same day in each year thereafter," which should "exhibit and set forth the full amount of his receipts from commissions, discounts, abatements, allowances and all other profits arising from his business during the year ending the thirtieth day of November preceding the date of such annual return," the court held "that the act was not retroactive in its effect, and that it did not apply to the transactions occurring in that part of the year ending the thirtieth day of November, which had already passed at the time of the enactment of the law."

The Pennsylvania case is directly against the interpretation of the attorney-general, even though the language of the New York statute was as explicit as he claims. Without accepting as sound the decision just quoted, when the words of the law were so very clear, it is nevertheless high authority to show with what reluctance courts give to legislative enactments a retroactive effect. The act under consideration is not so precise and definite as that of Pennsylvania as to the date of the first report. The time of the making thereof was in the latter distinctly stated, whilst in the former it is to be inferred from all the words used. It has already been shown that our statute, by its plain language, does not provide for taxation upon past business, but upon future transactions, by requiring a semi-annual report in every year

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after the year of its passage, and this is so manifest, that without further discussion, I proceed to the second point which the action involves, and that is: Is the defendant taxable upon the premiums received for insurance upon property situated without the state?

The answer depends upon the force of the words "received on business done in this state," the premiums paid to the company on which its reports must show.

It is true, that in one sense, all the business of an insurance company located in the state, is done within its borders. From its general office all its policies issue, and to it all premiums are returned. While this is so, however, it is also true that in ordinary conversation a distinction is made when we refer to the business of an insurance company, between policies issued upon property within and without the state. The former is generally spoken of as "business done in this state," and the latter as "business done without the state." Very plainly the legislature had this precise distinction in mind. If it had not, why were the words "received on business done in this state" inserted? The construction of the attorney-general makes them useless, for it will require a report showing the premiums received upon all its business. Nay, the same section (the fifth), in which the words occur, also defines them, for after providing for a report from a domestic company, "setting forth the entire amount of premiums received on business done in this state," it also requires a report from "every fire or marine insurance company organized under the laws of any other state or country, and doing business in this state." If the argument of the attorney-general is true, that all insurance effected by a company is business done within the state in which it is located, without any regard to the location of the property insured, then the provisions of the same section in regard to the taxation of foreign companies "doing business in this state" would not be operative, because the transaction of such business here would be a legal impossibility. It is respectfully urged that

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the argument answers itself ; that the legislature meant something when it used the words on which comment has been made, and that as a tax was imposed by it upon foreign companies doing business in this state, it supposed that other states and countries might impose similar taxation upon our corporations doing business within their borders, and that, therefore, they should be taxed here only upon "business done in this state," that is, upon premiums received on policies insuring property located within our own territory.

The third and remaining question is : Can the defendant be taxed upon premiums received for insurance upon goods imported from foreign countries, still in original packages and stored in bonded warehouses ?

In *Cook agt. Pennsylvania* (97 U. S., 566), it was held : "1. A tax laid by a state on the amount of sales of goods made by an auctioneer is a tax on the goods so sold. 2. The statute of Pennsylvania of May 20, 1853, modified by that of April 9, 1859, requiring every auctioneer to collect and pay into the state treasury a tax on his sales is, when applied to imported goods in the original packages by him sold for the importer, in conflict with sections 8 and 10 of article 1 of the Constitution of the United States, and therefore void, as laying a duty on imports and being a regulation of commerce."

The principle upon which this case, and several others cited by Mr. justice MILLER in his opinion, rests is, that though nominally the law imposes a tax upon the business of the auctioneer, such tax is really levied upon the goods, because the amount thereof is added to the price when sold. Precisely this reasoning applies to the case before us. The company taxed raises its insurance, and the owner of the goods increases his selling price, and by the sale thereof to others at the increased price, the goods are made to bear the burden. Assuming, then, as must be assumed, the case cited to be sound law, the conclusion follows that this tax cannot be upheld. If an auctioneer who sells imported goods cannot be taxed upon his sales, because such tax is really one upon

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the goods sold, then an insurance company cannot be taxed upon premiums received for insurance on the same species of property, for that must also be a tax imposed by the state upon the property itself.

The same doctrine has also been held in this state by both the supreme court and the court of appeals, in *People agt. Moring* (47 Barb., 642; 3 Keyes, 374), upon a statute identical, in the parties and transactions attempted to be taxed, with the Pennsylvania one which the supreme court of the United States pronounced invalid.

After a careful consideration of every question involved in this case, I am led irresistibly to the conclusion that the defendant is entitled to judgment.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Connecticut.

Insurance companies — their taxation under law of 1880 — Not taxable on receipts during the five months preceding the passage of the act.

In a suit founded upon the fifth section of the act entitled, "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations," which act became a law June 1, 1880, and took effect immediately (*Laws of 1880, chap. 542*):

Held, that the statute should not be so interpreted as to give to the state the tax upon the income of the defendant for the five months preceding its enactment.

The law of 1880 required a semi-annual report from the companies to be taxed, and that such a semi-annual report was to be made, to use the express words of the act, "in each year." As a semi-annual report only, and no other, is called for, and that must be made *each* year, it follows that the section of the statute laying the tax and calling for the report, when it uses the word *hereafter* to designate the commencement of the time when its provisions shall take effect, refers to the years which are to follow the one during which the law was passed (*See The People of the State of New York agt. The National Fire Insurance Company of New York, ante, 334*).

Albany Circuit, January, 1881.

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William B. Ruggles, deputy attorney-general, for plaintiffs.

Joseph H. Choate, for defendant.

WESTBROOK, *J.* — This action is brought to recover against the defendant, which is a corporation existing under the laws of and in the state of Connecticut, a tax claimed to be due by virtue of chapter 542 of the Laws of 1880, of this state. The suit is founded upon the fifth section of the act, and the claim made in behalf of the people is, that the defendant must pay to the state “a tax of eight-tenths of one per centum upon the gross earnings in this state, of said corporation or company,” for the six months preceding July 1, 1880. The act became a law June 1, 1880, and took effect immediately, and the question which the action presents is, must the statute be so interpreted as to give to the state the tax upon the income of the defendant for the five months preceding its enactment?

In another cause tried at this circuit (*The People agt. The National Fire Insurance Company in the city of New York*, ante, 334), it was decided that the act would not bear the interpretation which the plaintiffs claim. To the opinion written in that case reference is hereby made.

The general scope of that opinion was, that the law of 1880 required a semi-annual report from the companies to be taxed, and that such a semi-annual report was to be made, to use the express words of the act, “in *each* year.” As a semi-annual report only, and no other, is called for, and that must be made *each* year, it follows that the section of the statute imposing the tax and calling for such report, when it uses the word *hereafter*, to designate the commencement of the time when its provisions shall take effect, refers to the years which are to follow the one during which the law was passed.

In the present case, if that be possible, the construction given to the act in the other action is still more plain, because by the clause of the section applicable to it the payments to

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be made are "on the first day of February and August in each year," and they are to represent "eight-tenths of one per centum on their gross premiums received by them on business transacted in this state during the six months preceding the first day of January and July." Such payments are to be made as the act declares "hereafter," that is, thereafter "in each year" and on the first day of February and August.

The first day of payment specified being "the first day of February" following the day of the passage of the act, as well as the year of its passage, which payment must be the tax upon its premiums received "during the six months preceding the first day of January," which succeeds the passage of the law, it is clear that there can be no recovery in this action.

SUPREME COURT.

JOHN H. BEWLEY and another agt. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and others.

Insurance (Life)—Policyholders not partners, but mere creditors of the corporation—they can only obtain relief as judgment creditors—Complaint—Demurrer.

Where plaintiffs, suing as policyholders of the defendant corporation, seek to call the directors of the company to account for various alleged breaches of trust, whereby the company's assets are claimed to be wasted and wrongfully misappropriated, and asks for a receiver and an accounting:

Held (sustaining demurrer to complaint), 1. That no trust was created or now exists between the plaintiffs and the defendant corporation and its directors. 2. The plaintiffs' alleged claim being thus reduced to mere creditors of the defendant corporation, which is solvent and able to meet all its obligations, they can only obtain relief as judgment creditors.

Special Term, July, 1881.

William Blakie and Francis C. Barlow, for plaintiffs.

Alexander & Green, for defendants.

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LARREMORE, *J.* — The complaint avers, on information and belief, that the defendant corporation was organized under the laws of the state of New York, and is now carrying on the business of life insurance and selling annuities in New York and Massachusetts, on a basis of \$100,000 of capital stock, consisting of 1,000 shares of \$100 each. That a large majority of such stock is held and professed to be owned by the directors of the corporation as individuals, and a large proportion thereof by the individual defendants. That said stock is legally entitled to receive semi-annually a dividend not greater than seven per cent per annum, and all other assets, savings and property, in excess of legitimate death losses, endowments, annuities and claims, should be and are lawfully vested in and held by said corporation and its directors in trust for the plaintiffs and other policyholders, as security for the payment of policies according to the terms and conditions thereof, which now amount to \$150,000, and are held by about 4,500 policyholders. That the directors of said corporation are elected by the votes of the stockholders thereof, who have continued in office for many years the same directors. That the individual defendants, by their control and ownership, or supposed control and ownership of the shares of stock, have been enabled to secure, and have secured, their own election to valuable official positions in said corporation from year to year, and have maintained and exercised absolute and unqualified control and dictation of and over the official conduct and action of said board, and over the management and business affairs of the corporation. That on August 22, 1872, the defendant corporation issued its policy to the plaintiff John H. Bewley for \$10,000 upon his life, for the sole use and benefit of his wife, the plaintiff, Mariette Bewley, to be paid to her in the event of his death, if she survived him; if not, then to his children. Plaintiffs have regularly paid the premiums accruing upon the policy, which is now in full force and effect.

The complaint further avers, on information and belief,

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that the individual defendants, as officers and directors, in violation of their duty as such, and of the statute in such case made and provided, and to the great loss, damage and injury of the plaintiffs and all the policyholders of said corporation, have wrongfully misappropriated, misapplied and wasted the property thus held in trust, by purchasing and holding certain real estate in the cities of New York and Boston, by the purchase of stock which had not a market value at or above par, in a corporation in which a majority of said defendants were directors, and in the investment of said trust moneys in other corporations, to the benefit and advantage of some of the individual defendants herein. That defendants are simply trustees of the property and assets of the defendant corporation, and that plaintiffs and other policyholders therein are the *cestui que trust* and the only real owners thereof. That the action is brought not only in behalf of the plaintiffs, but of all other policyholders similarly situated. That application has been made to the officers and directors of the defendant corporation to bring an action against the individual defendants to refund the moneys thus misappropriated and wasted, which has been neglected, and no such action has been instituted.

Plaintiffs demand that an accounting of such money be had; that a receiver thereof be appointed, and that an injunction issue restraining the defendants from further action in the premises. To this complaint a demurrer was interposed as to misjoinder and defect of parties; that several causes of action have been improperly united, and that the complaint does not state facts sufficient to constitute a cause of action. The objection last mentioned substantially involves the merits of the controversy and will be first considered.

The demurrer admits only the facts alleged, and not the inferences drawn from them (*City of Buffalo* agt. *Holloway*, 7 N. Y., 493).

From the elaborate and voluminous briefs submitted it becomes a privilege to select, rather than a duty to search for

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the law applicable to the case. At its present stage only a short review can be entered into to justify the conclusions reached.

Briefly then, what is the *status* of the plaintiffs under the policy in question as to these defendants? Are the former to be regarded as partners, *cestui que trust* stockholders or creditors, and, if either, to what extent can they invoke the aid of a court of equity upon the facts averred in their complaint? Detailed reference and discussion were made to and upon English authorities, notably the State Fire policies and the Kearns and Aldebert cases, in each of which the insolvency or inability of the corporation to meet its contract liabilities was undisputed. In this connection it should be observed that the peculiar nature of the contracts of insurance influenced the mind of the court (*Evans* agt. *Coventry*, 5 *De Gex, Mac. & Gordon*, 911; *Aldebert* agt. *Leaf*, 1 *Hemming & Miller*, 681; *Re State Fire Ins. Co.*, 11 *Weekly Reporter*, 746). In some cases the English policies contain an agreement charging the fund, and in others the same are signed by the directors of the association.

The Equitable Life Assurance Society is not a mere association, but a duly incorporated company, represented by stockholders and a board of directors. No pretense is made that it is insolvent or unable to meet all of its obligations, but the plaintiffs insist that it has violated the rights and privileges of its charter by improper and unauthorized investments of its funds, to the prejudice of themselves and all other policyholders. The question then occurs, what rights have been invaded and violated, and to what extent, if any, relief may be extended.

In *St. John* agt. *The American Mutual Life Ins. Co.* (13 *N. Y.*, 38), such rights and remedy were defined by the court of appeals in the language of one of its learned judges: "An insurance upon the life of an individual is a contract by which the insurer, for a certain sum of money or premium proportioned to the age, health, profession or other circumstances of

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the person whose life is insured, engages that if such person shall die, within the period limited in the policy, the insurer shall pay the sum specified in the policy according to the terms thereof, to the person in whose favor such policy is granted. I am not aware of any principle of law that distinguishes contracts of insurance upon lives from other ordinary contracts, or that takes them out of the operation of the same legal rules which apply to and govern such contracts. Policies of insurance are choses in action; they are governed by the same principles applicable to other agreements involving pecuniary obligations." This view was concurred in by all the judges of the court and should not be disregarded.

In *The People agt. Security Life Insurance Co.* (73 N. Y., 114), judge EARL explodes the doctrine that policyholders are to be treated as partners, and says: "They who pay their money for insurance are no more jointly interested or in any sense partners than the depositors in a bank. The depositors swell the assets of the bank and also its liabilities, and they have a common interest that the bank shall keep its funds so as to be able to discharge its liabilities, and that is all. * * The fund produced by the payment of all the premiums does not in any sense belong to the policyholders, but belongs exclusively to the company, and the policyholders are interested in it in the same way only that the creditors of other corporations are interested in its funds."

The claim of policyholders upon the theory of partnership was repudiated even in a mutual life insurance company (*Cohen agt. N. Y. Mutual Life Ins. Co.*, 50 N. Y., 610; see, also, *Taylor agt. Charter Oak Life Ins. Co.*, 59 How. Pr., 468).

In view of the authorities above cited, it is apparent that no trust was created or now exists between the plaintiffs and the defendant corporation or its directors.

Their alleged claim is thus reduced to that of mere creditors of the defendant corporation, and as such, what is their basis of action? The contingency upon which the payment of

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their policies depends has not arrived ; the company is solvent and able to meet all its obligations, and no actual loss or damage is averred. The case of *Carlisle* agt. *The Guardian Insurance Co.*, and authorities therein cited, were predicated upon a state of facts showing the insolvency of the corporation and amalgamation of its property. The case at bar is not analogous.

It is only as judgment creditors that plaintiffs can obtain relief. This point was decided at the general term of this court by chief justice BARNARD in *Belknap* agt. *North America Life Insurance Co.* (11 *Hun*, 282), and for the purposes of this trial must be regarded as controlling. The distinction between policies of life insurance and other ordinary contracts, which the learned counsel for the respondents insists should be made, must be left to the tribunal of review.

When this case was before the general term, on an appeal from an order denying a motion for leave to amend the complaint, judge BARRETT, in affirming the order appealed from, intimated that even if the complaint was bad, plaintiffs might well be remitted to the discretion of the special term (when the demurrer is disposed of) on the subject of further amendment and costs.

I fail to preceive, upon the conclusion reached, what the plaintiffs can gain by a further amendment in the case, and think that the defendants should have judgment in their favor upon the demurrers.

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SUPREME COURT.

CATHARINE WALDELE, administratrix, &c., agt. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Evidence — Dying declarations, in civil cases, not to be regarded as testimony unless taken under oath.

Dying declarations have no weight as testimony in civil cases unless made under oath, whereas in murder trials the words spoken by the victim before expiring carry conviction with them.

On the trial of an action brought by plaintiff against the railroad company for damages for the killing of her son, evidence of declarations of the deceased, narrating the circumstances under which the accident occurred, was admitted:

Held, that such declarations were merely hearsay and not admissible in evidence.

Monroe Special Term, May, 1881.

MOTION by defendant for a new trial on case and exceptions.

Mr. Harris, for motion.

Mr. Oliver, opposed.

DWIGHT, J. — This motion is heard by me for the reason that the justice before whom the action was tried has since gone out of office. The exception, which I regard as necessarily decisive of the motion, was taken by the defendant to the admission of evidence of declarations of the deceased, narrating the circumstances under which the accident occurred. This ruling, I think, was error. It was made, and it is sought to sustain it on the authority of the *Travelers' Insurance Company* agt. *Mosely* (8 Wall., 379); but it seems to me clear that the application of the authority cited involved a misapprehension of its doctrine. The declaration in that

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case was admitted as part of the *res gestæ*. The *res* was the dying or suffering condition of the subject of the insurance, and the declarations were admitted as characterizing and describing that condition. He was found on the ground at the foot of a staircase. The declaration received was to the effect that he had fallen down the stairs. It is true the sufferer went further and stated for what purpose he was on the stairs, but that portion of the declaration was wholly immaterial, was not to the prejudice of the defendant, and was not the subject of discussion in the case. The declaration as to the cause of the injury was held admissible only as a statement by the patient in the nature of a disclosure of his symptoms.

A man is found in an injured and suffering condition; he states to his physician, or whomsoever comes to his succor, how he is suffering, what his injuries are, and, as part of such descriptive statement, he tells how the injury was received. So far the statement relates to his present, his actual, condition. It is calculated to aid in the choice of treatment to be applied for his relief or cure. An examination of the patient's condition involves the query, "How did the condition arise?" Did he fall in a fit? Was he shot or stabbed? Or was he struck down by a blow? Therefore the statement that he had fallen down stairs was a part of the *res gestæ*.

Such a declaration is admissible in evidence only as descriptive of present condition, not as narrative of past conduct or events.

And this is clearly the doctrine of the case cited. The court in that case carefully discriminates between declarations which are descriptive and those which are merely narrative.

The same discrimination applied to the case at the bar would have admitted the declaration of the deceased that he had been run down by the cars; it would have been descriptive of his existing injury, and explanatory of his present condition. But a statement of how he came upon the track, as that he waited for a long train to pass, that he looked both

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ways and did not see the engine by which he was struck, was purely narrative—it related not to his existing condition, but to his past conduct. The propriety of this distinction is most clearly manifest when we observe that the two classes of declarations apply severally to two distinct issues involved in the action; the one, that of the agency of the defendant in causing the death complained of; the other, that of negligence on the part of the deceased contributing to that result.

The first of these issues involved an inquiry as to the nature and effect of his injuries, and the declaration that he had been struck by the cars, while it bore upon that issue, was admissible only because descriptive of the condition of injury existing at the time the declaration was made.

On the other hand, the issue of contributory negligence involved only his conduct in the past, which in no way affected his present condition. His sufferings were no more or less severe, his injuries no more or less serious or likely to prove mortal, whether he went upon the track with his eyes shut, or exercising all his faculties to avoid the collision.

His declaration bearing upon that issue was therefore merely hearsay and not admissible in evidence.

The case in *Wallace* affords no warrant for the admission of such declarations, and if any of the cases which profess to follow that decision go to such length, it has been, as I judge, in excess of the plain doctrine of that case and in contravention of the principles upon which it is based.

For the errors indicated a new trial should be granted in this case.

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N. Y. COMMON PLEAS.

ISAAC NEBENZAHL, plaintiff and respondent, agt. EDWARD M. TOWNSEND and HENRY C. YALE, defendants and appellants.

False imprisonment — Malicious prosecution — cause of action for, are inconsistent and cannot be joined in one action — When and when not action for malicious prosecution maintainable — What must be averred and proved — Action for false imprisonment, when not maintainable.

T. and Y., in a suit against N. and M., held them to bail on a provisional order of arrest, but after judgment, without taking the debtors in satisfaction, caused their arrest under a Stilwell warrant. After the latter proceedings had been dismissed — because plaintiffs having elected to proceed under the provisions of the Code, could not take proceedings under the Stilwell act, and the decision had been affirmed by the general term, and while a further appeal was pending — N. brought this action against T. and Y. for false imprisonment and malicious prosecution:

Held (reversing judgment for plaintiff): 1. That the two causes of action being inconsistent, and could not, therefore, be joined in one action, plaintiff should have been required to elect under which count he should proceed.

2. It being incumbent on plaintiff, in order to make out a cause of action for malicious prosecution, to show that there was a want of probable cause for the warrant, and as the plaintiff had given no evidence on his part to establish any such cause of action and had objected to any evidence of the existence of probable cause, the complaint as to this cause of action was properly dismissed.

3. The complaint for a malicious prosecution should have been dismissed also, because no such action is maintainable unless plaintiff avers and proves that the suit or prosecution was determined in his favor, while, when this action was brought the proceedings under which the arrest had been ordered were not terminated, as an appeal was then pending.

4. As to the remaining count, for false imprisonment, the complaint should have been dismissed, the process under which the plaintiff had been arrested being regular, and the arrest under it lawful; and the discharging of the warrant because the plaintiff should not be allowed to resort to two remedies, did not render the warrant and the proceedings under it void.

General Term, June, 1881.

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TOWNSEND AND YALE sued Nebenzahl and Marks for goods sold and delivered, and held them to bail on a provisional order of arrest. After judgment, without taking the debtors in satisfaction, they procured a Stilwell warrant on charges of fraudulently contracting the debt, fraudulently disposing of property and refusing to apply assets in payment. Testimony was taken, and after a hearing, judge LAWRENCE made an order dismissing the proceedings on the merits, on the ground that plaintiffs, having elected to proceed under the provisions of the Code, they cannot take proceedings under the Stilwell act based upon substantially the same facts as those disclosed in the affidavits on which the order of arrest was granted. The judgment-creditors appealed to the general term, where the order was affirmed. They then appealed to the court of appeals, which dismissed the appeal. Pending that appeal, Nebenzahl brought this suit against Townsend and Yale, alleging, first, a cause of action for false imprisonment; second, a cause of action for malicious prosecution; third, a cause of action for an unsuccessful prosecution. On the trial it was admitted that these three causes of action were all based on the same proceedings above stated. The trial court dismissed the second and third causes of action, but held the first, and submitted the question of damages to the jury, who found a verdict of \$250 for plaintiff. The defendant moved for a new trial, which was refused, and appealed from the order and judgment. The plaintiffs also moved for a new trial, and appealed from the order denying such motion and from the judgment dismissing the complaint as to the second and third causes of action.

North, Ward & Waggstaff, for defendants and appellants.

Blumensteil & Hirsch, for plaintiff and respondent.

DALY, C. J.—The warrant granted under the act to abolish imprisonment for debt was not absolutely void because the

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defendant had been arrested substantially upon the same state of facts in an action previously brought by the plaintiff, in which the defendant had given bail, and in which judgment had been recovered against him and another. It may be a good reason for discharging his warrant, as was done in this case, upon the ground that the plaintiff should not be allowed to resort to both remedies; that, having elected to pursue one he should be precluded from resorting to the other (*People* agt. *Goodwin*, 50 *Barb.*, 564; *Latore* agt. *Brien*, 6 *Abb. Pr.* [*N. S.*], 66; *Wright* agt. *Ritterman*, 1 *Abb.* [*N. S.*], 431).

But this does not render the warrant and his proceedings under it void. If granted by the proper officer, upon affidavits establishing any one of the grounds of arrest specified in the statute, it is valid, and is a protection to the officer and to all acting under it (*Stewart* agt. *Biddlecum*, 2 *Comst.*, 205; *Rockford* agt. *Boody*, 56 *N. Y.*, 460, 461; *People* agt. *Tweed*, 63 *N. Y.*, 205; 5 *Hun*, 392; *Brown* agt. *Crowl*, 5 *Wend.*, 298; *Wright* agt. *Ritterman*, 4 *Rob.*, 710, 711; *Cooper* agt. *Harding*, 7 *A. & El.* [*N. S.*], 939, 940).

The warrant is not void, but can be vacated upon application to the court, upon the ground that it is vexatious, being instituted merely to harass and annoy, as has frequently been adjudged in cases where, after a defendant has been sued and arrested, a second suit is brought for the same cause in which he is arrested; which application to discharge the defendant from the second arrest is not, however, a matter of right, but rests in the discretion of the court (*Farlay* agt. *Ellfson*, 2 *East.*, 453; *People* agt. *Tweed*, 63 *N. Y.*, 205), as there may be cases where it is allowable to do so. Thus, in *Olmion* agt. *Delany* (2 *Str.*, 1216) it was, under the circumstances of that case, held that the defendant might be arrested in a second action before the former action, in which he had been arrested for the same cause, had been discontinued.

The warrant having in this case been granted by the proper officer, upon affidavits showing affirmatively a case within the statute, an action for false imprisonment could not be main-

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tained for an arrest under it — the only action that lies where the arrest and imprisonment is by lawful process being an action for malicious prosecution, which is maintainable if the prosecution was instituted by the one against whom action is brought maliciously and without probable cause.

The complaint was for false imprisonment and malicious prosecution, which was uniting two causes of action that were inconsistent with each other, for, if the arrest was without lawful authority, it was not a case of malicious prosecution (*Bourden* agt. *Alloway*, 11 *Moa.*, 180); and if under lawful process there was no false imprisonment, the imprisonment being by lawful authority. Each cause of action is distinct from the other. Thus, formerly, for false imprisonment the remedy was trespass, and for a malicious prosecution it was case (*Elder* agt. *Smith*, 2 *Chitty's R.*, 304). Both cannot exist on the same state of facts, or, to put it more clearly, if one lies upon the facts the other does not. The complaint contains a good count for malicious prosecution, averring that defendant caused to be made affidavits upon which he obtained from judge LAWRENCE a warrant for the arrest of the plaintiff, upon which he was arrested and held to bail; which proceeding, prosecution and arrest it is averred was instituted by the defendant, maliciously and without probable cause; and a count for false imprisonment, which averred that the defendants wrongfully and by force caused the plaintiff to be taken into custody and imprisoned, without any right or authority; and that the imprisonment was under a warrant wrongfully and irregularly issued at the instance of the defendants; which count might possibly be sustained if the warrant, process or other proceeding by or under which he was imprisoned was void, being without authority in law. When the plaintiff had opened the case, the defendant moved that the plaintiff be required to elect under which count or cause of action in the complaint he would proceed, which was denied, and the defendants excepted. As the plaintiff could not maintain an action for false imprisonment, and one also for malicious pro-

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secution for the same arrest and imprisonment, I think he was bound to elect under which he would proceed, but the point is not material from what subsequently occurred.

The plaintiff then put in evidence all the proceedings under which he was arrested, in pursuance of the act to abolish imprisonment for debt. He was examined as a witness on his own behalf, and upon his cross-examination the defendant put several questions to him for the purpose of showing that there was probable cause for the granting of the warrant, such as asking him if there was anything in the affidavits upon which the warrant was granted, which he thought was not correctly stated; to which the plaintiff objected, and the judge sustained the objection, the defendants excepting. As there were counts for malicious prosecution, the defendants had a right to show the existence of probable cause, unless the plaintiff had abandoned, or meant to abandon that cause of action, and that he had is inferable from his objecting to any evidence of the existence of probable cause. To make out such a cause of action, it is incumbent upon the plaintiff (*Lovell agt. Roberts*, 1 *Salk.*, 15) to show that there was a want of probable cause for the warrant, and as the plaintiff had given no evidence on his part to establish any such cause of action, and objected to the defendants giving any to prove the existence of probable cause, the judge, on the defendants' motion, after the plaintiff had rested, dismissed the complaint as to this cause of action, or, as it appears in the case, the second and third causes of action in the complaint, the third cause amounting to nothing more than an averment of the granting of the warrant, the arrest of the defendants, the entering into by him of a recognizance, and a decision by judge LAWRENCE discharging the plaintiff from arrest, and dismissing the warrant and complaint, and the affirmance of that decision by the general term of the supreme court and the court of appeals; which, containing no averment of the essential ingredient of a want of probable cause, was no averment of any cause of action

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whatever. To this decision the plaintiff excepted, and has also brought an appeal to review it, the answer to which appeal has already been stated in part, that plaintiff rested without giving any evidence establishing a want of probable cause, and after a ruling by the court upon his objection that the defendants had no right to offer any on the subject.

From the plaintiff's points on the appeal, I infer that he regards the discharge of the arrest and dismissal of the proceedings by judge LAWRENCE, upon the ground that the plaintiff had previously been arrested in another action for substantially the same cause, as establishing, as a conclusion of law, the want of probable cause.

It is not necessary, however, to pass upon this point, there being another reason why the complaint for a malicious prosecution should have been dismissed, which is that when the action was brought, the proceedings under which the arrest had been ordered were not terminated, as an appeal was then pending from the decision of the general term of the supreme court, affirming the decision of judge LAWRENCE, to the court of appeals, and until the determination of that appeal it could not be known whether the plaintiff would be discharged from the proceedings against him or not, for if the decision of the court below were reversed upon appeal, the plaintiff would have to be recommitted. The pending of such appeal is, in its effect, somewhat analogous to a discharge by *nolle prosequi*, in which case it has been adjudged an action for malicious prosecution will not lie, because new process may issue upon the indictment (*Goddard agt. Smith*, 6 *Mod.*, 261; *Hughes agt. French, Willis*, 520, note b).

No action for malicious prosecution is maintainable until the proceeding or suit in which the party has been prosecuted and imprisoned has been finally terminated by his acquittal and discharge, or by a verdict or judgment in his favor, or where there has been an abandonment of the proceeding or suit by the party that instituted it, thereby establishing conclusively and beyond further question that there was no

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ground for his arrest ; the reason originally given for the rule being that until the proceeding is finally determined it does not appear that the prosecution or suit in which the party was arrested was unjust (*Watson agt. Freeman, Hob.*, 266, and *Williams' note to the case in 1 Am. ed.*), and because "it ought to be shown that it was false and hopeless" (*per PARKER, C. J., in Parker agt. Langley, 10 Mod.*, 209 ; *id., Gilbert's Cases*, 163).

It is essential, therefore, to a cause of action for the plaintiff to aver and prove that the suit or prosecution was determined in his favor (*Hunter agt. French, Willis*, 517 ; *Fisher agt. Bristow, Day*, 215 ; *Morgan agt. Hughes, 2 T. R.*, 223 ; *Skinner agt. Gunton, 1 Sandf.*, 229 ; *T. R.*, 176 ; *Arundel agt. Tragane, Yelv.*, 117 ; *Beauchamp agt. Croft, Dyer*, 285 a ; *Robbins agt. Robbins, 1 Salk.*, 15 ; *Bird agt. Line, Comy*, 190 ; *Goddard agt. Smith, 6 Mod.*, 262).

"It is," says the court in *Parker agt. Langley (supra)*, "a proper answer to show that it is pending," which it certainly is, when there has been an appeal from the judgment which has not yet been decided ; and it must also be shown that the suit was determined, or the plaintiff acquitted or discharged before the action was brought (*Pursell agt. McNamara, 9 East.*, 157 ; *Woolford agt. Askley, 2 Camp.*, 194 ; *Phillipps agt. Shaw, 4 B. & A.* 435 ; *Stoddard agt. Palmer, 3 B & C.*, 2).

The case was then left to rest upon the single count for false imprisonment ; and, at the close of the trial, the defendants moved for a dismissal of the complaint, as it then stood, upon the ground that an action for false imprisonment had not been established, the process under which the plaintiff had been arrested being regular, valid, and the arrest under it lawful, which was denied, and the defendants excepted.

I think, for the reasons already given, that this motion ought to have been granted, and that the defendants are entitled to have the judgment reversed and a new trial ordered, costs to abide the event.

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SUPREME COURT.

WILLIAM A. LOTTIMER *et al.* agt. JANE C. BLUMENTHAL *et al.*

*Construction of will—Remarriage of widow of testator—Repugnancy—
Rejecting words.*

The testator, after making various devises, directs his executors, in the eighth clause of his will, to pay the residue of the net annual income of the estate to his wife, during her life or until she should *remarry*; but in case she should *remarry* she was to have an annual income which was to be readjusted, and she was to receive it during her life, for her sole and separate use, free from any debts or control of her husband. In the tenth clause the testator directs that, upon her death or *remarriage*, all the estate was to be divided between his children and their issue:

Held, that the word "remarriage" occurring in the tenth clause was inadvertently and unintentionally used by the testator as an event which would cut off rights in others and hasten the division of the estate, and that the words should be rejected as irreconcilable with the general scope of the will, and as in conflict with the expressed intentions of the testator, both general and special, as shown by the will itself.

Special Term, May, 1881.

THIS is an action by the executors and trustees under the will of William Lottimer, deceased, for the construction thereof.

The testator died in the year 1876, leaving a large estate. He left as his survivors his widow, Jane C., and five children, all of age, except a daughter Mary.

The clauses or parts of the will more immediately concerned in this controversy are the eighth and tenth paragraphs.

The widow of the testator remarried with Charles E. Blumenthal in the year 1880; and the difficulty which brings the will into court is in the construction of the provisions directing what shall be done upon the happening of this "remarriage."

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In the preliminary portion of the will, the testator bequeaths to his wife his furniture, pictures, &c., with a power to his executors, upon her death, to sell the same and invest and divide the proceeds thereof in the manner directed in his will in respect to the residue of his estate and property. Afterwards, the testator provides for the setting aside of securities to produce an annual income for his sisters and nieces, and directs that upon the death of these persons severally, the principal sum of these securities shall become part of the residue of his estate. There are other specific provisions which are not important to be considered in this connection.

The eighth subdivision of the eighth clause provides as follows: "My said executrix, executors and trustees shall, after the payment to my children of their aforementioned annual incomes, from the said net annual income of my estate, pay all the rest and residue of said net annual income to my beloved wife Jane Catherine Lottimer, during her life, or until she shall remarry, annually, from the time of my death. But in case she shall remarry, and the net annual income from my estate shall be — or shall be more than — \$50,000, then a sum of such securities sufficient to yield a net annual income of \$20,000 shall be set aside by my trustees and kept invested as aforesaid, and they shall collect and receive the said net annual income and pay the same over to my said wife Jane Catherine, annually, for and during her life, in quarterly payments, from the time of her marriage, upon her sole and separate receipt, and for her sole and separate use, free from any debts, engagements, or control of any husband she may have; and upon her death the said principal sum of securities shall become part of the residue of my estate. But in case the net annual income from my estate shall, at the time of her marriage, be less than the sum of \$50,000, then it is my will that the principal amount of securities to be set aside for her benefit, as aforesaid, shall be decreased to a sum the annual income from which shall be, as near as may be, proportionate to the net annual income last mentioned from my estate, and

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in proportion that \$20,000 of income bears to \$50,000 per annum."

The tenth clause of the will is as follows: "10th. Upon the death or *remarriage* of my wife, then my surviving executors and trustees shall divide all and singular my estate, real and personal, of every nature and description, into as many parts or shares as there shall be of my children then living, and the issue of such of them as may have died leaving issue, such issue, upon such division, to take *per stirpes* and not *per capita*, the part or share his, her or their parent would have been entitled to if living; and that they shall set apart or assign one of such shares for each of my children, and to the issue of such of them as may have died leaving issue, such issue to have only the respective share or shares his, her or their parent would have been entitled to if living. But, upon such division, the share of my son shall be twenty per centum more than any share assigned to each of my daughters."

William H. Arnoux, for plaintiff.

Wm. F. MacRae, for infant defendants.

Elihu Root, for Jane C. Blumenthal.

VAN VORST, *J.*—It is claimed on the behalf of the infant defendants, that the provisions made by the testator in the eighth clause of his will in behalf of his wife, in the event of her "*remarriage*," are so inconsistent with, as to be entirely revoked by the express directions and limitations contained in the tenth clause, which directs that upon her death or "*remarriage*" all the estate was to be divided between the children of the testator and their issue. The ground upon which this conclusion is placed is, that where the provisions of a will are irreconcilably repugnant, the latter provision must prevail.

It is, doubtless, the rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they can-

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not possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention (1 *Jarman on Wills*, p. 472 [5th Am. ed., Boston]). But the rule which sacrifices the former of several contradictory clauses is never applied but on a failure of every attempt to give to the whole will such a construction as will render every part effective (*Idem*, 475). Such reasonable construction should be given "*ut res magis valeat quam pereat*." All parts of a will are to be taken together in ascertaining its meaning, and no part be rejected as inoperative, if the whole can reasonably stand together (*Norris agt. Beyea*, 3 *Ker.*, 283). And the rule above indicated — that the provision of a will which is posterior in position, is an indication of a subsequent intention, and must prevail to defeat anterior gifts — is inoperative when the general scope of the will leads to a contrary conclusion (*Van Nostrand agt. Morse*, 52 *N. Y.*, 12). In this regard, as in all others, when construction is called for, the real intention of the testator is to be gathered from the whole will; and rather than that such intention should fail, inconsistent words may be rejected.

Should the construction of the tenth clause of the will which is urged upon the court by the learned counsel for the infant defendants prevail, or such effect as claimed by him be given to it — that the whole estate, upon the "remarriage" of the widow, is to be divided up between the testator's children — it would defeat the clearly expressed intentions of the testator, both special and general, and the considerate provisions he had intelligently made for his sisters, nieces and wife, which were, by his express directions, to continue with respect to them severally as long as they should live, or at least should not terminate until her death. It would also break in upon and seriously disturb the consummation of other gifts and provisions carefully made, dependent, not upon the "remarriage" but the "death" of the wife, which it is not necessary here to enumerate. Such result could not, in con-

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struction be accepted, except absolutely necessary. But limiting the inquiry to one subject — the remarriage of his wife — it will be seen that this event had been intelligently considered by the testator. In the eighth clause of the will this contingency was contemplated and provided for in harmony with the other provisions of the will in her behalf and others'. By such remarriage his widow was not to be deprived of her proportion of the income of his estate; but, otherwise, on the happening of such event her share was to be readjusted and she was to receive it during her life, for her sole and separate use, free from any debts or control of her husband. If the provisions of the eighth clause are allowed to stand, the principal of the whole estate, out of which this income is derivable, cannot be divided up and given away to others until her death.

A full consideration of all the provisions of the will, and the contingency upon which — the death of his wife — other interests and rights are intentionally made to depend, in connection with the fact that the remarriage of his wife had been clearly contemplated by the testator, without disfavor, in the eighth clause of the will, and provision thereupon made in her favor based upon such fact, leads to the conclusion that the word "remarriage" occurring in the tenth clause of the will was inadvertently and unintentionally used by the testator as an event which would cut off rights in others, and hasten the division of his estate. If that word be dropped the whole will can be carried out, and the purposes of the testator effectuated as he clearly intended, and no interest will be sacrificed. The enjoyment of the principal, it is true, may be postponed until the death of Mrs. Blumenthal, but not ultimately defeated or impaired. Allowing this word to remain disturbs the well considered scheme in the testator's mind, both general and special, when he executed his will.

Words in a will are not to be expunged upon mere conjecture, but where they are irreconcilable with the general context they may be rejected, whatever their local position (*Jarman on Wills*, vol. 1, p. 480, and cases cited).

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As a reasonably clear deduction that the word "remarriage" in the tenth clause was unintentionally, and through a mistake, used, appears from the direction that the division therein contemplated was to be made by the "surviving executors and trustees." This would seem to indicate that his wife, who was an "executrix" and trustee under the will, had died before the division was to be made. In previous portions of the will the testator had been careful to use the word "executrix" in connection with the words "executors and trustees" when duties were imposed, with respect to the management, care and appropriation of his estate. And this omission occurs in subsequent parts of the will with respect to the care and division of the estate, evidently based upon the fact of the death of his wife when the division contemplated by the tenth clause was directed to be made. I think it quite clear that the word "executrix" was in those instances dropped by the testator intentionally, for the reason that those things were only to be done after her death.

The conclusion reached is that the word "remarriage" found in the tenth clause of the will, should be rejected as irreconcilable with the general scope of the will, and as in conflict with the expressed intentions of the testator, both general and special, as shown by the will itself; and judgment is ordered accordingly.

COURT OF APPEALS.

JOHN BAXTER, respondent, agt. WILLIAM F. DRAKE, appellant.

Arrest—Foreign judgment does not affect the right to arrest—Code of Civil Procedure, § 552.

A foreign judgment does not prevent an arrest in this state, in an action relating to the same cause of action, if such cause of action be one in which the defendant was liable to be arrested under the Code.

Section 552 of the Code of Civil Procedure was intended to, and did settle the rule as to the effect of a judgment in the court of another

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state, and as to the right to an order of arrest, and confers an absolute right to sue for the original cause of action ; and within the provisions of this section, the action may be maintained upon the judgment and an order of arrest be granted upon proof that a proper cause of action originally existed.

May, 1881.

Algernon S. Sullivan, for appellant.

David J. H. Wilcox, for respondent.

MILLER, *J* — The complaint in this action is upon a judgment alleged to have been recovered in the circuit court of the United States for the eastern district of Tennessee. The action was originally brought in the state court of Tennessee, and was removed, upon the application of the defendant, to the circuit court of the United States. An affidavit upon which the order of arrest was granted shows that certain bonds, \$1,000 each, were delivered to the firm of which the defendant was a member, to be sold on commission ; that all of them, except eighteen which were duly demanded, were accounted for, and for those said firm refused to account, and they were kept and converted to the use of said firm ; and that a judgment was recovered for the said conversion, in the said circuit court, for the same amount which the plaintiff claims to recover in this action. The case at bar was one for which the defendant was clearly liable to be arrested under the Code of Procedure (*see secs. 549, 550*), and the question now presented is whether the right to arrest was lost by reason of the recovery of the judgment in the circuit court of the United States. Before the enactment of the Code of Civil Procedure the question whether a recovery of a judgment in a court out of the state merged the original cause of action and the right to an order of arrest was the subject of consideration by the courts, and the decisions in regard to the same were not entirely uniform (*Wanzer agt. De Bawn, 1 E.*

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D. Smith, 261; *Greenbaum agt. Stein*, 2 *Daly*, 223; *Fellows agt. Cook*, 50 *How.*, 95). These decisions, in the New York common pleas, hold that the right to arrest exists notwithstanding the judgment. In the supreme court there is some conflict, but the contrary rule is upheld by the weight of authority. In *Goodrich agt. Dunbar* (17 *Barb.*, 644) an order of arrest was granted after a judgment had been obtained in another state, and the general term held that the law of this state was that a judgment merges the original cause of action (*See, also, Mallory agt. Leach*, 23 *How. Pr.*, 507; *Goodale agt. Finn*, 2 *Hun*, 151). A contrary doctrine is upheld in *Arthurton agt. Dalley* (20 *How. Pr.*, 311). It was decided in this state many years since that a judgment extinguished the original debt, and that the judgment of the court of a neighboring state is no less effectual in extinguishing the demand on which it was rendered than the judgment of a court strictly domestic (*Besley agt. Palmer*, 1 *Hill*, 482; *see, also, Nicholl agt. Mason*, 21 *Wend.*, 341, 342; *Oakley agt. Aspinwall*, 4 *Cons.*, 513, 519, 520; *Suydam agt. Barber*, 18 *N. Y.*, 468, 470). Upon the enactment of the Code of Civil Procedure, an additional provision was made (*sec.* 552), which declares that "the recovery of a judgment in a court, not of the state, for the same cause of action, or, when the action is founded on fraud or deceit, for the price or value of the property obtained thereby, does not affect the right of the plaintiff to arrest the defendant, as prescribed in this title." It is insisted that this section was intended to and did settle the rule as to the effect of a judgment in the court of another state, and as to the right to an order of arrest, and a note of the commissioners to this section states that this was a new provision settling a point upon which the authorities are in conflict — whether a foreign judgment prevents an arrest in this state in an action relating to the same cause of action. The provision cited clearly declares that where a judgment has been recovered in the court of another state for the same cause of action that the right of the party to an order of

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arrest is not affected. This interpretation gives the right to prosecute upon the demand the same as if no judgment had been obtained, and whether the suit was upon the judgment or upon the original cause of action separately is not, I think, material, and cannot affect the right conferred, as "the same cause of action" evidently means the cause of action on which the judgment was entered. The action here is on the judgment, and one of the affidavits upon which the order of arrest was granted shows that it was for the conversion of property, and thus establishes that it was for the same identical cause of action as the judgment itself. The true interpretation of the section cited is that where there is a judgment out of the state, when the action is of such a nature as to authorize an arrest, the plaintiff has a right to sue within the state for the original cause of action precisely the same as if no judgment had been obtained, and that such judgment is not a bar to the action brought. Although the debt had passed into the form of a judgment, the action for damages arising from the conversion still remains and is not merged therein." The learned counsel for the appellant claims that the plaintiff is not compelled to sue in debt upon the judgment, and he could bring his action for the original cause, and it is optional with the defendant whether to plead merger in the judgment. If this position is a sound one, the former judgment would be a bar to the suit upon the original cause of action, and hence it would be but a useless ceremony to sue. If such be the case, the provision of the Code last cited would also be meaningless and of no effect whatever. It was intended, evidently, as we have seen, to relieve against the extinguishment by the judgment on the original demand, and could have no effect if the judgment is a bar. Regarding the section cited as designed to remedy an apparent defect in the Code, and to confer an absolute right to sue for the original cause of action, no sufficient reason exists why the action may not be maintained upon the judgment and an order of arrest be granted upon proof that a proper

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cause of action originally existed. The same result would follow if the action could be brought for the original cause; but inasmuch as the judgment constitutes a part of the proceedings of the plaintiff to enforce his demand, I think that within the provision cited, the action may be upon the judgment. The construction we have given does not enlarge the effect of the section cited, but merely gives it such legitimate force as is authorized by the language employed, and the remedy which the law makers evidently had in view.

A majority of the court are of the opinion that the action should be on the judgment, and not upon an independent cause of action. This leads to the same result, and the conclusion is that the order of arrest was properly granted, and the order of the general term should be affirmed.

All concur, except FOLGER, C. J., absent.

N. Y. COMMON PLEAS.

SOLOMON ISAACS agt. JEANE F. ISAACS.

Divorce — Alimony — when the payment of, enforced by punishment for contempt — Sequestration — When warrant to commit may issue without notice — Code of Civil Procedure, §§ 1772, 1773, 2268, 2269.

Although from the provisions of the Code of Civil Procedure *it seems* that the husband may be committed to prison without notice, if he fails to pay the alimony awarded, provided that the court shall decide that sequestration or the giving of security would not result in getting the money for the wife, yet *it seems* the court will not imprison the husband for the non-payment of alimony without first giving him notice of the application for his commitment, when it has not adjudicated that it would be of no avail to make an order of sequestration, or for the giving of security.

It was the intention of the codifiers to change the law as it existed under the Revised Statutes, and to prohibit the commitment of the husband for the failure to pay alimony, until the court had become satisfied by

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proof that the money could not be collected either by sequestration or by requiring the husband to give security.

The court may determine that it would be useless to order sequestration or security. When it so determines the husband may be committed without notice if he neglects to pay the alimony which he is ordered to pay.

Special Term, July, 1881.

IN this suit, which was for an absolute divorce, the plaintiff was ordered, pending the action, to pay about \$350 arrears of alimony and counsel fee, and twenty-two dollars weekly alimony. He was imprisoned for failing to comply with the order. His counsel now moves to set aside the warrant of commitment, upon the ground that the court had no jurisdiction to grant it.

D. Calman, for plaintiff.

McMahon & Munger, for defendant.

VAN HOESSEN, *J.*—Section 1772 declares that the court may, in its discretion, require the husband to give security for the payment of the allowance made for the support of the wife. It also authorizes the court, if it sees fit, to sequester the personal estate and the rents and profits of the real estate of the husband.

Section 1773 contains certain provisions, the meaning of which is rendered somewhat uncertain by the obscurity of the codifier's language. That section provides that where the husband fails to pay, and it appears presumptively that payment cannot be enforced either by sequestration or by a resort to the security, if any, which the husband may have given, the husband may be punished for a contempt of court. It is discretionary with the court either to give, or not to give, the husband notice of the application that he be punished; and it is further provided that notice may be given to him of the

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application to punish him for contempt, although his property has not been sequestered, and although he has not been required to give security, if the court shall be satisfied that it would have been of no use to make an order of sequestration or an order for security.

Section 2268 authorizes the court to commit a person to prison who neglects to pay a specified sum of money which the court has required him to pay. Such a person may be committed without notice, says section 2269. The application for his commitment may be made *ex parte*, on proof by affidavit that a personal demand for the money has been made upon him and that he has refused or neglected to pay it (*Section 2268*).

From these provisions it seems that the husband may be committed to prison without notice, if he fails to pay the alimony awarded, provided that the court shall decide that sequestration, or the giving of security, would not result in getting the money for the wife. May the court imprison the husband for the non-payment of alimony without first giving him notice of the application for his commitment, where it has not adjudicated that it would be of no avail to make an order of sequestration, or for the giving of security? That is the principal question presented by the defendant on this motion.

Exactly what the codifier meant by the phrase, "it appears presumptively," I am at a loss to say. Presumptively, says Worcester, means "by previous supposition." Presumption, says Bouvier, means "an inference as to the existence of one fact, from the existence of some other fact, founded on a previous experience of their connection; or it is an opinion that circumstances give rise to, relative to a matter of fact which they are supposed to attend." What presumption can there be as to the ability or the inability of a husband to pay alimony? What the codifier meant, perhaps, was that before the person of the husband should be seized, proof satisfactory to the court should be given that the alimony could not be

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collected out of his estate, and that he could not give good security for its payment. It is possible that the giving of such proof is making "it appear presumptively" that payment cannot be enforced by the means prescribed by section 1772. That this is so is rendered more probable by the last sentence of section 1773, which provides that notice may be given to the husband of the application to punish him, where "the court is satisfied that sequestration and the requiring of security would be ineffectual." From these provisions I think the conclusion must be drawn that it was the intention to change the law as it existed under the Revised Statutes, and to prohibit the commitment of the husband for the failure to pay alimony until the court had become satisfied by proof that the money could not be collected either by sequestration or by requiring the husband to give security. The court may determine that it would be useless to order sequestration or security, and where it so determines the husband may be committed without notice, if he neglects to pay the alimony which he is ordered to pay.

No proof of such a character was offered, and no such adjudication was made in this case, and therefore the warrant of commitment was prematurely granted, and it should be vacated and set aside.

As the question is new and one of importance, I will grant a stay of proceedings, if the attorney for the wife desires to appeal from the order which I shall sign.

SUPREME COURT.

ELISHA R. BROCKWAY, appellant, agt. JOHN B. IRELAND,
respondent.

Liability of trustees of manufacturing corporations under section 15.

In this action the plaintiff sought to charge the defendant, as one of the trustees of a manufacturing corporation, with the amount of a certain debt of the corporation, under the provisions of section 15 of the gen-

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eral manufacturing act, on the ground that certain reports made by the corporation were false in material representations contained therein, and that the defendant, who had signed the same, knew such reports to be false. It appeared, among other things, on the trial that the whole capital stock (\$300,000) was issued in payment for the mine, manufactory and other property of the corporation. The case was tried and submitted to the jury on the theory that if the property had been purchased by the corporation for a price in excess of its value, and if the defendant knew at the time when he signed such reports that such was the fact, then the plaintiff was entitled to the debt sued for:

Held, on the question of the good faith of the trustees in their estimate of the value of the property for which the capital stock was issued, and on the question of their notice of its actual value, that it was competent to show the representations made to them by experts and others competent to judge of the actual value of the property. But that it was for the jury to determine whether they, in good faith, acted and relied on the opinions which they so received and believed the value of the property to be as represented.

Held, further, that it is not necessary that each trustee should have actual personal knowledge of the property and of its value. That in many cases they must depend upon the representations of experts and others presumed to have a practical knowledge of the property and its value.

Fourth Department, General Term, April, 1880.

Leander W. Fiske, for appellant.

Larned & Warren, for respondent.

TALCOTT, *P. J.*— This is an appeal from an order denying a motion for a new trial, made on the minutes of the court after verdict at the Lewis county circuit. The action is against the defendant Ireland, as the president of "The Black River Iron and Mining Company of New York," to recover on a due bill for sixty-three dollars and ninety cents, given by the corporation as a balance due the plaintiff from the corporation for wood purchased in 1873. The action is in substance against the defendant, as president and trustee of the said corporation, for not having made the annual report of the said corporation, as required by section 12 of the "act to

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authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848.

The certificate of the acknowledgment of the articles by which the said corporation was created was dated July 27, 1872. What purported to be an annual report, as required by said section 12, signed by the defendant and a majority of the trustees of said corporation, and duly verified by the defendant, as president, and by the secretary of said company, was duly filed, and both of said reports were introduced in evidence on the part of the plaintiff, and the counsel for the plaintiff claimed to recover under section 15 of the said act, on the ground that the said reports were false in material representations contained therein, and that the said defendant, who had signed the same, knew the same to be false, and was therefore individually liable for the debts of the corporation. The said reports were as follows, *mutatus mutandis* :

ANNUAL REPORT OF THE BLACK RIVER IRON AND MINING
COMPANY.

January 1, 1873.

The amount of capital stock of the said company is \$300,000. Three thousand shares of \$100 each which has been paid, not for cash, but for the purchase of the company's property.

Capital actually paid in as cash.....	\$300, 000
Amount of existing debts not over.....	15, 000
And due on purchase, to be paid within five years,	27, 000

JOHN B. IRELAND,
W. MURDOCK,
JAMES CRINKSHANK,
THOMAS H. WAGSTAFF,

Trustees.

The report filed on the 1st of January, 1874, was similar in all respects to the report of 1873, except that the amount of existing debts was stated to be not over \$100,000. The

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amount of capital stock of the said corporation was correctly stated according to the articles of association. The act of 1848 was amended by the Laws of 1853, chapter 333. By the second section of said act of 1853 it was provided as follows: "The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and taken to be full stock and not liable to any further call, neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of said act, but in all statements and reports of the company to be published this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

It appeared in the case, in fact, that the whole of the capital stock, \$300,000, was issued in payment for the mine, manufactory and other property of the corporation, and the action was tried and submitted to the jury on the theory that if the property had been purchased by the corporation for a price in excess of its value, and if the defendant knew at the time when he signed such reports that such was the fact, then the plaintiff was entitled to the debt sued for of the defendant individually.

Such is the effect of the decision of the court of appeals in an action against this same defendant by a different plaintiff founded upon similar facts (*Douglass agt. Ireland*, 73 *N. Y.*, 100). In the case referred to, the court says: "All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to the stock honestly issued in pursuance of the act of 1853, is to prove two facts. First. That the stock issued exceeded in amount the value of the property in exchange for which it was issued. Second. That the trustees deliberately and with knowledge of the real value of the property, overvalued it and paid in stock for it an amount which they knew was in excess of actual value. The

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value must be determined in any action in which the question arises, upon such evidence as may be given, having respect to the circumstances and the nature of the property and the *scienter* and guilty action of the trustees may be proved either directly or inferred from circumstances."

The two questions specified by the court of appeals were the questions which were substantially submitted to the jury in this case under a charge from the court, to which no exceptions appears to have been taken, and the jury have found a verdict for the defendant.

On these questions, especially upon that involving the good faith of the trustees, there was evidence *pro* and *con* sufficient to render them, especially the latter, questions of fact for the determination of the jury, and we cannot say that the inferences which the jury were entitled to draw from the facts developed by the evidence, as opposed to the testimony given in behalf of the defendant, were or could have been in any way conclusive of the defendant's liability. We think, also, that the evidence given as to the representations of other parties to the trustees, as to the value of the property transferred to the corporation in payment for its stock, was admissible upon the question of notice to the trustees of the actual value. It cannot be that such a corporation cannot in good faith buy property for its stock, unless each trustee has an actual personal knowledge, not only of the property, but of its fair value. They must, in many cases, depend upon the representation of experts and others presumed to have a practical knowledge of the property in question, and be competent to judge of its actual value. In such cases, of course, the question remains open to be determined by the jury as to whether the trustees in good faith acted and relied on the opinions which they received, and believed the value of the property to be as represented. On the whole, we are unable to say that the verdict was against the evidence, or that any ruling made by the trial judge was erroneous.

Order denying a new trial affirmed.

Merriam agt. Wolcott.

SUPREME COURT.

ELIZABETH G. MERRIAM agt. ANSON F. WOLCOTT and others.

Will — construction of — From what time does a will speak — When conditions in a will as to legatee's not marrying void — Conditions subsequent — Validity of marriage — Amendment — Costs.

The testator on the 1st day of July, 1878, made and published his last will and testament, in which is contained the following provision:

"*Second.* I give and bequeath unto the persons hereinafter named as my executors the sum of twenty-five thousand dollars in trust; that they shall keep the same invested and pay over the interest, income and profit thereof to my daughter Elizabeth G. Merriam during her natural life. If, however, she shall marry a second time, then this bequest of such interest, income and profit to her, and the direction to pay over the same to her, shall cease and be void. Upon her death or marriage the said twenty-five thousand dollars shall go absolutely to her children by her present husband, Henry H. Merriam (if any be then living), share and share alike. If any of such children shall have died leaving descendants who are still living, then such descendants shall take the share which their respective parents would have taken had such parents survived. Such share of the principal sum of twenty-five thousand dollars shall not be paid over to the persons entitled to the same respectively, until he or she shall become thirty years of age. If after the death or marriage of the said Elizabeth as aforesaid, she shall leave no descendants by her present husband, then the said twenty-five thousand dollars shall go absolutely to my son, James E. Wolcott, or, if he be dead, then to his descendants." The plaintiff and her husband (Merriam) had separated in June, 1878, and in December, 1878, she went to Chicago, where she continued to reside till after the death of her father, which occurred in August, 1880. She applied for and obtained a divorce from her husband (Merriam) for desertion, with the knowledge and approval of her father. Before the death of the father, and on the same day her decree of divorce was entered, which was April 29, 1880, she was married to her present husband, Mr. McMullen:

Held, that this plaintiff is entitled to a judgment declaring that she is entitled to receive the interest, income and profit of the \$25,000 from the time of the death of the said testator, and that the condition in said will, to the effect that her interest in or claim to said fund should cease in case of her marriage of a second husband, was and is absolutely void.

For some purposes a will is considered to speak from its date of execution, and for others from the death of the testator. The general rule is that a will speaks from the death of the testator and not from its

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date, where there is nothing in its language indicating a contrary intention. When a testator refers to an actual existing state of things, the language is referential to the date of the will.

In respect to conditions subsequent, there must be a capacity and opportunity and an option on the part of the legatee to perform the conditions before a forfeiture of the legacy is or can be incurred. A court of equity, at all times reluctant to enforce a forfeiture or a penalty, will not do so when the victim of it has acted in ignorance of the conditions upon which or with whose non-compliance such forfeiture was involved or dependent.

Where, as in this case, the testator knew that his daughter was separated from her husband, and he had abandoned her, and that she had removed to another state to gain a residence which would enable and qualify her to procure a divorce from such husband, he had paid for her support in such state, and defrayed the expenses of the suit to procure such divorce, and knew that she was entitled to marry again after such divorce, which he knew, before his death, had been granted:

Held, that to impose upon her the duty, under the bair of forfeiture of all interest in his estate, to remain unmarried for life, was harsh and cruel in the extreme, when such restriction was contained in a secret will unknown to her, and which she could not know till after his death. In such case the estate, to which the condition contained in such will was annexed, became absolute, to the same effect as if said condition had been fully complied with.

Where the marriage of the plaintiff with her present husband took place at 11 o'clock on the morning of April 29, 1880, and the decree of divorce was, in strictness and in fact, actually granted, entered and perfected at or about 2 o'clock in the afternoon of the same day:

Held, that plaintiff's marriage with Mr. McMullen was valid and binding upon the parties. It was made in good faith, both parties supposing and believing that she was actually divorced. The decree for that purpose would be considered as granted at the opening of the court on that day, as the court will not divide a day or examine critically the precise hour of the day in which any act in court is done; inquire into the fractions of a day, except in cases of necessity, for the purpose of guarding against injustice or where important rights are concerned.

Although the plaintiff had commenced this action in the name of her former husband (Merriam), the court has power to allow an amendment which shall substitute the name of the plaintiff in her present name of McMullen for her former name of Merriam upon the record, so that she may have judgment in her favor by her present name (McMullen).

The costs of all the parties should be paid out of the residuary funds in the hands of the executor.

August, 1881.

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THIS action was commenced to obtain the construction, by this court, of the will of the late George P. Wolcott.

The plaintiff was his daughter and was married to Henry H. Merriam in 1874, who left her and finally separated from her in June, 1878. While they lived together they lived with her father in Rochester, and she continued to live with her father after such separation till December, 1878, when she left this state and went west to Chicago, where she continued to reside till after the death of her father, which occurred in August, 1880.

While in Chicago, she applied for and obtained a divorce from her said husband for desertion, with the knowledge and approval of her father, who paid the expenses of the suit and also sent her the requisite money for her support while residing in Chicago. Wolcott, the testator, while the plaintiff was living with him, and on the first day of July, 1878, made and published his last will and testament, in which is contained the provision which presents the chief question in controversy in this action, and which is in the words following, to wit:

“*Second.* I give and bequeath unto the persons herein-after named as my executors the sum of twenty-five thousand dollars in trust; that they shall keep the same invested and pay over the interest, income and profit thereof to my daughter Elizabeth G. Merriam during her natural life. If, however, she shall marry a second time, then this bequest of such interest, income and profit to her, and the direction to pay over the same to her shall cease and be void. Upon her death or marriage the said twenty five thousand dollars shall go absolutely to her children by her present husband, Henry H. Merriam (if any be then living), share and share alike. If any of such children shall have died leaving descendants who are still living, then such descendants shall take the share which their respective parents would have taken had such parent survived. Such share of the principal sum of twenty-five thousand dollars shall not be paid over to the persons entitled to the same respectively until he or she shall become thirty

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years of age ; if after the death or marriage of the said Elizabeth, as aforesaid, she shall leave no descendants by her present husband, then the said twenty-five thousand dollars shall go absolutely to my son, James E. Wolcott, or, if he be dead, then to his descendants."

Charles F. Baker, for plaintiff.

Oscar Craig, guardian *ad litem*, and *James L. Angle*, for defendants.

E. DARWIN SMITH, *Referee*.—In construing a will the first inquiry that suggests itself will naturally be, at and from what period its language speaks.

Jarman on Wills (page 298) says, upon this point, that "For some purposes a will is considered to speak from its date of execution, and for others from the death of the testator. The former being the period of its inception, and the latter that of the consummation of the instrument."

The rule is well stated by the supreme court of Connecticut in two cases—*Canfield agt. Bostwick* (21 Conn., 550), and *Gold agt. Judson* (21 Conn., 616), as follows: "The general rule is that a will speaks from the death of the testator and not from its date, where there is nothing in its language indicating a contrary intention. When a testator refers to an actual existing state of things, the language is referential to the date of the will" (*Vide* 1 *Jarman*, 318; *Van Alstyne agt. Van Alstyne*, 28 N. Y., 377; *Van Vechten agt. Van Vechten*, 8 Paige, 116; *McNaughton agt. McNaughton*, 41 Barb., 50, and *Id.*, 34 N. Y., 201).

So far as relates to the existing state of things when this will was made, the testator must be considered as speaking from its date, of his children, of the plaintiff and her two children, of her then husband, and of the relations then existing between the plaintiff and her then husband. The plaintiff was then living with him with her two children, and her

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husband had separated from and abandoned her, charging her with adultery, which imputation was known to the testator. All else spoken of or referred to in the will, so far as respects the plaintiff, relates to the future and speaks from the death of the testator. The plaintiff and her husband at the date of the will were then separated, and the testator doubtless supposed that such separation was final, and he probably contemplated that a divorce at the instance of one or the other would sooner or later confirm such separation. They were both young persons, having been married only about four years, and he doubtless considered that they would in future desire, one or both of them, to form other matrimonial connections, and in making said will he doubtless intended to interdict, so far as he was able to do so, his daughter from contracting a second marriage. His intention in this particular clearly must prevail, unless it is inconsistent with the rules of law. If she had been his wife he unquestionably might have any devise or bequest or legacy to her dependent upon the condition that she should remain his widow, and to determine upon her contracting a second marriage. She was his daughter, and he could have made any legacy or devise to her dependent upon her remaining unmarried if she had been under the age of twenty-one years, till she arrived at such age (*Stackpole agt. Beaumont*, 3 *Vesey*, 94); or without the consent or approval of other relatives, or of his executors under restrictions which are not unreasonable (2 *Jarman on Wills*, 42).

By the civil law from which the courts of equity in England derived many of their rules in respect to personal legacies, all conditions in wills restraining marriage, however qualified, were absolutely void. "Our courts," said an eminent English judge (lord ROSLYN) in the case of *Stackpole agt. Beaumont* (3 *Vesey*, 95), above cited, "in deciding questions that arose upon legacies out of lands, properly followed the rule that the common law prescribed;" but as to legacies relating to the personal estate it was otherwise. "It is impossible," he said, "to reconcile the authorities or range them under one

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sensible, plain, general rule." These rules were derived from the ecclesiastical courts, which follow largely the civil law." But he held in that case that the law of England did allow restraint upon marriage under the age of twenty-one years, and said that, "confined to such cases where the restraint operated only up to the age which by the law and policy of the country consent is necessary, he had no difficulty to say there was no authority to lead the court to presume that such a condition was invalid." This is as far as the lord chancellor would go. In *Long agt. Dennis* (4 Burr, 2052), lord MANSFIELD said: "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness. They are contrary to sound policy."

Judge STORY, in his *Equity Jurisprudence* (sec. 280), thus summarizes the decisions of the English courts as follows: "The general result of the modern English doctrine on this subject (for it will not be found easy to reconcile all the cases) may be stated in the following summary manner: 'Conditions annexed to gifts, legacies, and devises in restraint of marriage are not void, if they are reasonable in themselves and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against the public policy and the due economy and morality of domestic life, it will be void.'"

Fonblanque on Equity (page 198, note 9), says: "If the condition be precedent and annexed to land, it must be strictly performed in order to entitle the party to the benefit of the gift. If the estate is personal, the force and validity of the conditions must be reasonable. If the conditions be subsequent, its validity will depend on its being such as the law will allow to divest an estate."

Coke Lit., 206 b. (*Godolphin*, also, as Story says, sec. 283), correctly laid down the general principle that all conditions against marriage are unlawful, but if the condition is only such as where marriage is not absolutely prohibited, but only

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in part restrained as in respect to time and place and person, such conditions are not to be utterly rejected.

But judge STORY, in section 287, also says that "one distinction is between cases where, in default of a compliance with the condition, there is a bequest over, and cases where there is no bequest over upon a like default of a party to comply with the condition." In the former case the bequest over becomes operative and defeats the prior legacy. In the latter, that is where there is no bequest over, the condition is treated as ineffectual.

Judge STORY, in stating this distinction between the cases, does not modify the view of conditions in restraint of marriage, stated above in his summary of the result of the modern English cases, in section 280 above cited, or assent to the reasonableness of the distinctions suggested in this section 287. He merely stated the fact that such distinction is made in the cases, and the result or effect of the conditions in restraint of marriage when there is a bequest over. There is, it is true, such *dicta* or assumption, as he suggests, in many of the cases in the English reports, but there is not, I think, an express decision of the point where it was essential to and involved in the actual decision made.

The cases cited by judge STORY, in respect to the distinction stated in this section 287, are *Clarke agt. Parker* (19 *Vesey*, 13), where the provision in the will provided in case the daughter of his sister-in-law, Sarah, should marry with the consent and approbation of his trustees, she should take the legacy in question. She married without such consent and the court held that she was not entitled to the legacy. The next case is *Wheeler agt. Bingham* (3 *Atkins*, 368). In that case the testator gave to each of his grand-daughters who should be living at the time of his decease, £1,500 on their respective days of marriage, and provided that if either of such grand-daughters married without the consent of her father and mother, or of the survivor of them, then he revoked what was directed to be paid her, &c. The plaintiff,

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one of the said grand-daughters, married without the consent of her father and mother, and lost her legacy.

The next case is *Chauncey agt. Graydon* (2 *Atkins.*, 216). In that case the testator directed his trustees to transfer £1,000 of South Sea stock to each of seven children named, at the age of twenty-one years or day of marriage, they marrying with the consent of their father or his executor. Two of the children married without consent and it was held that they forfeited their claim to the legacy. Another case referred to is *Malcolm agt. O'Callaghan* (2 *Madd. R.*, 350). That was a case of a legacy made payable upon marriage with the consent and approbation of executors, with a limitation over upon marriage without consent. The condition was held in this case entirely legal. The other case is *Lloyd agt. Branton* (3 *Merivale*, 108), which was also a case where there was a marriage without consent with a bequest over, and the condition was held valid. *Roper on Legacies*, also, in a discussion of this question, makes the same distinction made by Story in section 287, and refers to the same class of cases on the subject (1 *Roper on Legacies*, p. 626).

In a note appended to his text, at page 795, this question is discussed and an extract inserted from an opinion of Mr. justice KENNEDY, of the supreme court of Pennsylvania, in the *Pennsylvania Law Journal*, 231, 235 (*Middleton agt. Rice*), where the judge says: "I apprehend in no case has it been held that if a legacy or bequest of personal property be given to a party either absolutely or expressly for life, with a condition subsequent annexed thereto if the legatee marries the legacy or bequest shall be given to a third party, such shall be good or available to the third person, because the condition being an absolute prohibition of marriage upon any terms whatever must be considered as wholly void and of no effect." And in *Jarman on Wills* (vol. 2, p. 38), in referring to the civil law and stating that by that law all conditions in restraint of marriage, whether precedent or subsequent, and however qualified, are absolutely void, it is said: "Our courts, however

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(while they equally deny the validity to conditions in general restraint of marriage, though accompanied by a gift over), have not yet adopted the rule of the civil law in its unqualified extent, but have subjected it to various modifications," which he proceeds to state. On the question that the courts deny the validity of conditions in general restraint of marriage, though accompanied by a gift over, he refers to the following cases: *Morley* agt. *Rennaldson* (2 *Hare*, 570, 584). In that case the testator gave a legacy to his daughter Margaret with a gift over to others in case of her marriage. The condition was held void as imposing a general restraint upon the marriage of the legatee. "Here," said the vice-chancellor, "the testator" (p. 584) "says his daughter ought not to marry and she shall not marry, and he gives the property after her marriage or death to other parties." Next he refers to *Loyd* agt. *Loyd* (2 *Simons* [*N. S.*], 255, 263). In that case the testator gave a bequest to his wife and another woman named Lockley, jointly for their lives, but if either married, the whole estate to go to the other. *Held*, that the condition was valid as to his widow but void as to Miss Lockley as a general restraint upon her marriage. And next, also, to *Bird* agt. *Hunsdon* (2 *Simons*, 342), where an annuity was left by a testator to the daughter of a friend to be paid to her as long as she remained single, with a bequest over in case of marriage. *Held*, an unreasonable restraint upon marriage and void.

In *Rishton* agt. *Cobb* (9 *Simms*, 615) the testator made a bequest to a widow lady not his wife, to receive the income as long as she remained single and unmarried. *Held*, that the condition was void as in restraint of marriage. And to the same effect is *Bellairs* agt. *Bellairs* (18 *Equity Cases*, *Laro Report* of 1874), where a testator gave to his two daughters each ten shares of a certain stock, but if either daughter married then the share was to go to the other in the proportions stated. The conditions held void. The same rule was held in *Williams* agt. *Cowden* (13 *Missouri*, 212), where a testator

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devised his estate to a son and daughter with the condition if the daughter married, the son was to have the whole estate. Condition held void.

In *Pool* agt. *Bott* (11 *Hare*, 33) a condition in a devise not to marry a certain person named, with a bequest over, was held void, and the court refused to enforce it. The bequest in this case to the plaintiff is an absolute bequest of a life estate or interest to her of the income and profit of \$25,000.

It is not upon a condition precedent where as in case of an estate to accrue or arise from a marriage where the marriage must precede the right to the estate and the title to it. In such case the estate vests upon the performance of the condition, and not otherwise. Such was the case of *Harvey* agt. *Aston* (1 *Atkins*, 380), *Scott* agt. *Tyler* (2 *Brown's Ch. cases*, 431) and *Stackpole* agt. *Beaumont* (3 *Vesey*, 96). Also *Per-rin* agt. *Lyon* (9 *East*, 93, and *vide Roper on Legacies*, 748).

There is a radical distinction between the vesting of an estate upon marriage and the divesting of an estate by or upon marriage. In the latter case the condition is subsequent and implies that the estate has vested. Such is this case. The estate in this case is first given to the plaintiff for life, and afterwards a bequest over is given to her children in case she shall marry a second husband, and upon that event the bequest of such interest, income and profit to her, and the direction to pay over the same to her, shall "cease and be void." That is, the estate first granted and vested shall cease (*Peyton* agt. *Bury*, *Peere Wms.*, 626). Such would clearly be the case here if the conditions which should destroy and avoid the preceding life estate and divest it were not absolutely void.

This will, in respect to all rights and interests in and to property speaks prospectively, and took effect from the death of the testator. At that point of time the estate vested in the trustees, and the life estate coeval with that event vested in the plaintiff. They began and coexisted from the same point of time. The marriage of the plaintiff before that time and in the life of the testator presents the chief difficulty in

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the case. If that event had been known to the testator before his death, and his assent to it could be presumed, that would virtually annul the conditions in restraint of marriage in the will within the cases *Wheeler agt. Warner* (1 *Simms & Stuart* [Eng. Ch.], 304), *Smith agt. Cordey* (2 S. & S. A., 354) and *Parnell agt. Lyon* (1 *Vesey & Beam*, 479), where the marriage was forbidden without the consent of executors or trustees.

The provision in restraint of marriage in this will must, I think, so far as relates to the intention of the testator, relate to the state and condition of the plaintiff and her relations to her former husband existing at the time of making the will. She was a then married woman and incapable of contracting a second marriage until she was divorced from her former husband or freed from her relation to him as his wife by his death.

Proof of a valid marriage after the making of the will must have the same effect to divest the estate if made before, as it would after the death of the testator, upon the same principle that the marriage of the two daughters of Mr. Van Vechten after the making of his will and in his lifetime did not divest them of their marriage portions to be given them upon marriage. The chancellor held that the portions were due and need not be paid in the lifetime of their father. It was his intent to give them the marriage portions, and, as he said, it did not follow that these outfits which the daughters were to receive as legatees in addition to their shares would only apply to marriages which should take place after his death (*Van Vechten agt. Van Vechten*, 8 *Paige*, 126).

The testator in this case clearly did not intend that his daughter should marry a second husband so far as he could restrict it. If he had made such second marriage to depend upon the consent or approval of his executors, I think it would have been a valid restraint and the plaintiff could not have received this legacy except and only as long as she complied with such restrictions. This view is subject, perhaps, to the qualifications hereinafter stated.

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First exception. — It is that she was one of his children and heirs-at-law, and independent of this will would have been entitled to the share of one-fourth in his estate as one of his heirs.

In *Porter* agt. *Fry* (1 *Ventries*, 199; reported, also, in 1 *Modern Reports*, 300, and *Thomas Raymond*, 236) a distinction is taken between persons who would have no title if there was no such instrument as that which contains the conditions and those who would have title without the instrument, and notice is considered necessary to subject the latter to the consequences of a breach of the conditions.

In that case there was a devise to A. K. in tail, upon condition that if she married without consent the estate should go over to the lessor of the plaintiff. She did marry without such consent, and the question was whether want of notice of the devise would save the forfeiture, and *RAINFORD*, justice, said: "I take a difference where the devisee who is to perform the condition is heir-at-law. The heir must have notice because he, having title by descent, need not take notice of any devise, unless it be signified to him." So in the case of *Wallow* agt. *Fitzgerald* (3 *Mod.*, 28, and *Skinner*, 125) where there was a conveyance by one Fitzgerald to himself with remainder to his daughter Catharine, and then intail with a proviso that if she married without consent the estate was to go over to another. She married without consent, but had no notice of the condition, and it was held in Ireland that Catharine should not lose the estate. The case was removed to the court of king's bench in England, and was twice argued there and the judgment unanimously affirmed — the court holding that Catharine's estate was not determined on the grounds of want of notice of the condition.

These, with other cases on the same point, are stated and reviewed in *Doe & Kenwick* agt. *Lord Beauclerk* (11 *East.*, 657), where, in or under a devise of a mansion and family estate to several persons successively for life, it was provided that whoever should be entitled to the estate should "take the

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surname of Thelwell, and make the mansion his usual and common place of abode and residence, and in case of refusal so to do should forfeit the estate, and it should go over to others. The estate in due time came to Charlotte Carter, who assumed the name of Thelwell, but did not make the mansion-house her usual and common place of abode and residence. It was claimed that by reason of the conditional limitations of the estate to her it ceased, and the limitations over took effect. Judgment was given for the said Catharine in the court below, and in the king's bench this judgment was affirmed in a very elaborate opinion of lord ELLENBOROUGH upon the express ground that she never had notice of the conditions in the will. He said: "Where a party is really ignorant of the existence of the instrument in which the condition is contained, and where he would have good title if there was no such instrument, it seems unreasonable to hold that a neglect of the terms of the conditions should subject him to a loss of the estate.

The same point was decided the same way in *Sheckelford and Wife* agt. *Hall* (19 *Illinois*, 215). The testator had several children and devised his estate, real and personal, to his wife for her life and remainder to his children, and declared it to be his will that none of his children under the age of twenty-one years should marry till each one should attain the age of twenty-one, and directed that in case any one married under the age of twenty-one, then and in that event he, she, or they should only be entitled to receive the sum of one dollar out of the estate as his or her portion — Eliza, a daughter, married before she was twenty-one. The restriction of marriage till Eliza arrived at the age of twenty-one was held valid, but as she was heir-at-law of the testator, and as such entitled to share in his estate independent of the will, and had no notice of the conditions in the will in restraint of marriage, she should not forfeit her estate. The court say that they must assume that Eliza did not know of the existence of the will, and much less of the conditions it

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contained that she should not marry till she was twenty-one years of age under the penalty of forfeiting her interest in her father's estate. In ignorance of the will she supposed she was entitled to take as heir without condition. The court held under the circumstances that "it would be a piece of monstrous injustice to enforce the forfeiture against her," and cites *Taylor agt. Crisp* (35 *Eng. Com. L. R.*, 522), upon the same point and the above case of *Kenwick agt. Beauclerk* (11 *East.*, 657), and other cases.

The case of *Taylor agt. Crisp* is also in 8 *Adol. & Ellis*, 788. This case relates of legacies out of real estate, but there is, as the lord chancellor said in *Stackpole agt. Beaumont* (3 *Vesey*, 95), no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same.

Secondly. 1 *Roper on Legacies* (page 782), says that conditions subsequent are construed with great strictness, and it is a consequence from this rule that if the subsequent conditions cannot be performed from being impossible or illegal, the condition is *void* and the legacy single and absolute.

It was contemplated in this case that the plaintiff should not marry after the death of the testator, and after she knew what condition he had imposed in his will against such second marriage. Her marriage before his death rendered compliance with this condition impossible.

It is like the case stated in *Roper* (p. 802), when the conditions are that the legatee should not marry without the consent of two or more trustees or executors, and the death of one of such executors or trustees rendered it impossible to procure such consent. In such case he says: "It being impossible to perform the conditions literally, the legatee will be excused from performing altogether."

The following cases affirm this rule: *Peyton agt. Bury* (2 *Peere Williams*, 626); *Jones agt. Suffolk* (1 *Brown's C. C.*, 528); *Knight agt. Cameron* (14 *Vesey*, 389); *Graydon agt. Hicks* (2 *Atkins*, 16, 18); *Aislabie agt. Rice* (3 *Mad-*

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dock's C. R., 256); *Grant* agt. *Dyer* (2 *Dow*, 87); *Story's Eq. J.*, sec. 1304; *Parker's Cases*, 73; 2 *Redfield on Wills*, 664.

All these cases imply that in respect to conditions subsequent there must be a capacity and opportunity and an option on the part of the legatee to perform the conditions before a forfeiture of the legacy is or can be incurred. A court of equity, at all times reluctant to enforce a forfeiture or a penalty, will not do so when the victim of it has acted in ignorance of the conditions upon which or with whose non-compliance such forfeiture was involved or dependent. No case can illustrate the injustice of a contrary rule more than this. The testator knew that his daughter was separated from her husband and he had abandoned her. He knew also that she had removed to another state to gain a residence which would enable and qualify her to procure a divorce from such husband. He paid for her support in such state and defrayed the expenses of the suit to procure such divorce, and knew that she was enabled to marry again after such divorce, which he knew, before his death, had been granted. To impose upon her the duty under pain of forfeiture of all interest in his estate to remain unmarried for life was harsh and cruel in the extreme, when such restriction was contained in a secret will unknown to her and which she could not know till after his death, when possibly it might be too late to save any interest in his estate.

At the death of the testator it was impossible for the plaintiff to comply with the conditions of the will requiring her to refrain from having a second husband. She already had a second husband. Such second husband had acquired that relation to her in due form of law, by ceremonial marriage, made in good faith after she had been, or supposed she had been, lawfully divorced from her former husband. In such case the estate to which the condition contained in said will was annexed became absolute (2 *Jarman*, 10), to the same effect as if said condition had been fully complied with.

This brings me to the consideration of the questions con-

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nected with the marriage of the plaintiff to her present husband. Such marriage confessedly took place between the hours of 10:30 and 11 o'clock on the morning of April 29, 1880. On the same day her decree of divorce was entered.

The trial to establish by proof her rights to such divorce was had on the twenty-fourth of the same month in open court before the judge presiding, who then announced that such proofs were sufficient to entitle her to such divorce and directed her attorney to have such testimony duly transcribed and a decree of divorce prepared.

It is the practice in the court in which this divorce was obtained, as I understand it, to have the testimony taken on the trial, and upon which the decree of divorce was founded, transcribed by the stenographer and presented to the judge for his correction and approval, and filed with the decree. This was done in this instance, and the final decree with this proof was filed, and such decree entered by the clerk under the direction of said judge on the twenty-ninth day of April. What took place in the meantime between the taking of the proofs and the time of the filing and entry of such decree, I think quite non-essential. The final decree speaks for itself. It is entered on the 29th day of April, 1880.

This decree and the transcript of the testimony with the fiat of the judge indorsed thereon, from the testimony of the judge and of the clerk, and from the course of business in said court, I should think was filed at the afternoon session of said court, commencing at two o'clock on the said twenty-ninth day of April. The testimony and draft decree were handed to the judge in court.

The judge testified that a transcript of the testimony was presented to him on or before the twenty-ninth of April, and after having been examined by him to see if they corresponded with his recollections of the testimony; they were indorsed by him, or rather signed by him as being a certificate of all the evidence in the case, signed by him in his official character. The pains taken by this judge to read this evidence

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and certify it, obviously suggests that some time was taken to do this. Perhaps it was done in some interval of business or at the recess at noon, and tends to confirm the belief of the clerk that these papers were filed in the afternoon session of the court. I think this a natural inference from the facts in connection with the other testimony on the subject, for no one could recollect time with exactness. I think I am forced so to find upon the evidence.

It follows from this view of the evidence that the decree of divorce was in strictness and in fact actually granted, entered and perfected at or about two o'clock in the afternoon of the twenty-ninth day of April. But I am inclined to think, nevertheless, that plaintiff's marriage with Mr. McMullen was valid and binding upon the parties. It was made in good faith, both parties supposing and believing that she was actually divorced. The decree for that purpose would be considered as granted at the opening of the court on that day, as the court will not divide a day or examine critically the precise hour of the day in which any act in court is done; inquire into the fractions of a day except in cases of necessity for the purpose of guarding against injustice, or where important rights are concerned (*Blydenburg* agt. *Cotheal*, 4 *Coms.*, 418; *Clute* agt. *Clute*, 3 *Denio*, 263).

The courts of this state uniformly amend the record if need be, and direct their judgments to be entered as of the first day of the term (*Manchester* agt. *Harrington*, 10 *N. Y.*, 169), or of the time when the act or judgment was actually due, as upon the rendition of a verdict or the direction for an interlocutory decree, or the time of the submission of a case to the court for its decision, and in furtherance of justice and to protect the rights of parties, direct such judgment to be entered and record amended *nunc pro tunc* to that end.

In this case I have no doubt that the circuit court in Illinois, in which this decree of divorce was granted, on due application for that purpose, would amend this record and direct the judgment or the decree of divorce to be entered

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nunc pro tunc as of the 24th day of April, 1880, when it was virtually granted and was, in fact, really due. And as the said marriage was in fact consummated by immediate and continued cohabitation of these parties as husband and wife, the courts of all the states in this country, I think, would in aid of such marriage and to sustain its validity, presume a further or subsequent marriage of said parties if need be, and would not allow either of said parties to disown such marriage to establish that they had, since it was solemnized in form, lived in a known and avowed state of prostitution and adultery, within the case of *Collins* agt. *Collins* (80 N. Y., 9).

These views lead to the decision that this plaintiff is entitled to a judgment declaring that she is entitled to receive the interest, income and profit of the \$25,000 from the time of the death of the said testator, and that the condition in said will to the effect that her interest in or claim to said fund should cease in case of her marriage of a second husband was and is absolutely void.

Another question exists in the case. It is whether the plaintiff having commenced this action in the name of her former husband (Merriam), can have judgment in her favor by her present name (McMullen). The case, it seems to me, is like that of the *Bank of Havana* agt. *McGee* (20 N. Y., 361). In that case the action was in the name of the Bank of Havana, that being the name of a private bank owned by Charles Cook, of Havana. The action had been tried upon its merits and the objection to the name disregarded till it reached the court of appeals, where it was held to have been improperly brought in the name of the bank, as it was not a corporation.

The court held that this was merely a formal error amendable in the court of original jurisdiction, and to be disregarded in that court, and was a plain case for amendment under section 173 of the Code as it then stood. The present Code has retained the same section amended, by inserting the words "on the trial or at any other stage of the action" (*sec.* 723),

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and section 1018 of the new Code gives to referees the same powers as the court in respect to amendments at the trial, to "allow amendments to the summons and to the pleadings," &c. The referee, under section 723, may conform the pleadings to the facts proved. I have some doubts upon the point whether the referee in this case can allow an amendment which shall substitute the name of the plaintiff in her present name of McMullen, for her former name of Merriam upon the record, and changing the summons and conforming the pleadings to the proofs; but as the power is clearly possessed by the court, I think it expedient to make such provision in the judgment to be rendered, as the court can clearly confirm such order or direction, and the judgment directed by me, I think, should be presented to the court for confirmation.

The next question is what direction shall be given in respect to the costs in this action. I have no doubt on this question. I think the costs of all the parties should be paid out of the residuary funds in the hands of the executors.

The plaintiff was obliged to come into court to get its decision in respect to her rights. The executors were justified in opposing her claim so far as to obtain the decision of the court in respect to the conflicting claims of the plaintiff and her children to said legacy, and for their own guidance, direction and protection.

The case I have regarded as one of great doubt and difficulty, and the decision to which I have come is the result of much research, study and reflection.

All parties should be paid their costs out of the residuary estate (*King* agt. *Strong*, 9 *Paige*, 100; *Rogers and others* agt. *Ross*, 4 *Johns. Ch.*, 608).

NOTE.—It is not our custom to publish the opinions of referees, but we think the foregoing is worthy of being made an exception. It will be remembered that the referee writing the same has occupied the supreme court bench for years, and has always stood among the first jurists of the state. The opinion is an important and well considered one, and will doubtless be cited with approval by our higher courts. — [Ed.]

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SUPREME COURT.

HENRY WHEELER agt. GEORGE W. MILLAR.

Practice — Appeal — Limitation of time — Sureties upon appeal — Defects in proceedings to perfect appeal, how supplied — Extending the time to give an undertaking when the time allowed by law has expired — Code of Civil Procedure, sections 578, 579, 580, 1303, 1334, 1335.

Where in a cause pending in Rensselaer county the judgment was docketed November 7, 1879, and notice of the entry thereof was served November eighth and notice of appeal was given November tenth. The sureties on the first undertaking did not justify, and one of the sureties on the second undertaking was rejected December second. By consent the time to give another surety was on that day extended ten days, so that the time to perfect the undertaking expired December 18, 1879. On December thirteenth a new undertaking was given, and the surety, on examination before judge DONOHUE in New York, was rejected December 22, 1879; and on the same day the defendant obtained an *ex parte* order from judge DONOHUE, in New York, giving him twenty additional days in which to give an undertaking. On motion by plaintiff to vacate the order:

Held, that the order was irregular for the following reasons:

First. The time allowed by law for giving the undertaking having expired, the defendant could only be relieved under section 1303 of the Code of Civil Procedure, of which plaintiff was entitled to notice.

Second. The order could only be made by the court (section 1303); and that granted was a judge's order.

Third. The cause was pending in Rensselaer county and relief could only be granted in that district, or in a county adjoining Rensselaer, on notice (*Code of Civil Procedure, section 769*).

Held, further, that while the order must be vacated with costs, the defendant should be relieved on terms. Upon payment of eighty dollars costs within twenty days, the defendant has leave within the same time to perfect a new undertaking.

Ulster Special Term, January, 1881.

MOTION to vacate an *ex parte* order obtained by defendant giving him additional time to procure surety upon appeal.

O. A. Martin and W. H. Townly, for plaintiff.

C. E. Coddington and John Sherwood, for defendant.

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WESTBROOK, J.—The judgment in this action was docketed November 7, 1879, for \$5,074.72, and notice of the entry thereof was personally served on defendant's attorney on November 8, 1879.

Notice of appeal was given November 10, 1879. The sureties on the first undertaking did not justify, and one of the sureties upon the second undertaking was rejected December 2, 1879. By consent the time to give another surety was on that day extended ten days, so that the time to perfect the undertaking expired December 18, 1879 (*Code, secs. 1334, 1335, 1351*).

On December 13, 1879, a new undertaking was given, and the surety on examination before judge DONOHUE in the city of New York was rejected December 22, 1879.

It will be observed that forty-four days had now elapsed since the service of notice of entry of judgment, and that the thirty days allowed by the Code to give the undertaking (*see sec. 1335*) and the ten additional days granted by the stipulation had passed four days. On said 22d day of December, 1879, the defendant obtained an *ex parte* order from judge DONOHUE in New York city giving him twenty additional days in which to give an undertaking. That order the plaintiff moves to vacate.

The order was irregular for the following reasons :

First. The time allowed by law for giving the undertaking having expired, the defendant could only be relieved under section 1303 of the Code, of which plaintiff was entitled to notice.

Second. The order could only be made by the court (*sec. 1303*), and that granted was a judge's order.

Third. The cause was pending in Rensselaer county, and relief could only be granted in that district, or in a county adjoining Rensselaer, on notice (*Code, sec. 769*).

Whilst holding, however, that the order must be vacated, with costs, I think the defendant should be relieved on terms. When a party, in good faith, gives notice of appeal, and in

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good faith procures sureties which he deems sufficient, who are rejected, he may (*to use the language of section 1303*) be said to have omitted to give the undertaking "through mistake, inadvertence or excusable neglect." By "mistake" or "inadvertence" he gave sureties which were insufficient, though he deemed them good, and his "neglect" to give good sureties within the time allowed by law is, therefore, "excusable."

The Code (*sec. 1303*) allows the court to grant the relief "upon such terms as justice requires," but this general discretion is controlled by law.

By section 1335 of the Code, sections 578, 579 and 580 are made applicable to the justification of the sureties on the appeal, and these sections give to the party who produces the sureties the right to name the time, place, and the officer for the justification. An order directing such justification to take place in Troy or Rensselaer might be irregular.

If the defendant had the right to give a new undertaking, the costs to be imposed would be limited to twenty dollars, ten dollars for the motion made by plaintiff to vacate the order of judge DONOHUE, and an additional ten dollars for resisting the defendant's affirmative motion for leave to give a new undertaking (*Matter of Waverly Water Works Co.*, 16 *Hun*, 57). The defendant, however, asks a favor, and as he has put the plaintiff to considerable expense in resisting and opposing two justifications, it is but fair that he should, in part at least, indemnify the plaintiff for resisting them. The costs upon each justification are fixed at thirty dollars, which the defendant must pay in addition to the twenty dollars costs of motion—in all eighty dollars—as a condition precedent to the right to give a new undertaking. Upon the payment of that sum within twenty days after service of a copy of the order to be entered on this motion, the defendant has leave, within the same time, to perfect a new undertaking.

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SUPREME COURT.

PETER A. II. JACKSON, as executor, &c., agt. CORNELIUS
WESTERFIELD and others.

*Will — Specific legacies — Liability of husband for wife's funeral expenses —
Legacies, when payable — Lapsed legacies — Opposing probate of will, when
not a forfeiture of legacy.*

The testatrix, who died in 1878, in her will, after providing that all her debts and funeral expenses be paid, directed her executors to keep invested in government bonds \$15,000, and pay the income to her husband, "such payments to commence immediately from and after my decease." She gave a nephew, by the fifth clause, from and after the death of her husband, one equal thirteenth part of \$14,000, together with a like share of her household furniture, immediately after her decease. She also gave him, by the sixth clause, \$5,000 of the proceeds of her real estate. In another clause of the will it was provided that if any of the legatees should die in her lifetime, "or before the time when such money should become payable to them respectively," then the legacies given to the one so dying "shall go to and be paid to his or her lawful issue then surviving." The nephew survived her some months, but died before the probate of the will, in August, 1880, leaving a widow and several children. By his will he gave his interest under his aunt's will to his wife by a second marriage. The children he left were by a former marriage. Eliza Totten, to whom legacies were given in the fifth and sixth clauses, died without issue in the lifetime of the testatrix:

- Held*, 1. That the executors should purchase government bonds of such description as \$15,000 would have purchased at the death of the testatrix, and if that sum will not now purchase as many bonds as it would at that time have purchased, they should use moneys of the estate to pay excess of premium. And the husband is entitled to receive out of the moneys in the hands of the executors, interest at the rate of five per cent upon \$15,000, from the death of the testatrix up to the time of the investment of the principal sum.
2. Although it may be true that the duty of burying the body of his deceased wife rests upon her husband, yet the wife may charge by her will her own separate estate with the expenses of her funeral, and she having done so, such expenses cannot be charged to the husband.
3. The nephew being entitled, at the testatrix's death, to his interest in the household furniture, such interest went to his wife under his will.

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4. Though the \$5,000 legacy to him was a gift of moneys, yet as it was not payable before an actual sale of the realty, and as the nephew died before it was payable, his executors cannot claim it, and it goes to his children, to whom, on such contingency, it was limited, as does also the legacy under the fifth clause, as it was payable only after the death of the husband of the testatrix, and he still lives.
5. The legacies to Eliza Totten lapse, and she not being a descendant of the testatrix, they are not saved by the statute, and so far as the gifts to her embraced any part of the moneys excepted from the sixth or residuary clause of the will, the testatrix died intestate.
6. The legatees who opposed the probate of the will have not thereby forfeited the legacies in their favor under the clause of the will declaring that any beneficiary who should make opposition or controversy in relation to its validity should thereby forfeit the bequest to him or her, it not being apparent that the opposition to the probate was not interposed in good faith or that it was vexatious.

Special Term, July, 1881.

ACTION for the construction of the will of Deborah A. Westerfield, deceased.

H. M. Colyer, for plaintiff.

John H. Jackson and *Charles W. Kimball*, for defendant Westerfield.

Winfield, Leeds & Morse, for defendant Bertine and another.

Edward P. Wilder, for defendant Peter B. Ross.

F. J. Moissen, for defendant Rapelyea and others.

Charles H. Glover, for defendant Kate Landy and others.

M. Hallheimer, for defendant Sarah Ross.

Daniel I. Ross, guardian *ad litem*, for infant defendants and others.

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T. B. Westbrook, for guardian *ad litem*, for infant defendants.

L. Redfield, for children of S. B. Johnson.

VAN VORST, *J.*—By the second clause of her last will and testament the testatrix, Deborah Ann Westerfield, directed that her executors should “keep invested in United States government bonds, of such description as they may think proper, the sum of \$15,000,” and should collect and receive the income and dividends thereof for and during the life of her husband, and pay over the same to him as the same shall be from time to time received by them, such payments, as she declares, “to commence from and immediately after my decease.”

This is not, as is supposed by some of the parties, a specific gift of government bonds. Although the testatrix, at the date of her will, in the year 1867, and subsequent thereto, may have owned government securities, still, at her death she left no bonds of that character. They had been disposed of by her during her lifetime and the proceeds otherwise invested. But for that reason the gift does not, as urged, fail. The gift is rather of money — “the sum of \$15,000” — accompanied by a direction to invest the same in particular securities, of such description as her executors should deem proper.

The executors have not up to this time made the investments, although the testatrix died in the year 1878. A contest having arisen in the surrogate’s court, which delayed the probate of the will, doubtless gave occasion to the postponement of the testamentary directions in this behalf. But this obstacle being removed and the will having been probated, the executors should at once purchase, with the moneys of the estate in their hands, government bonds in such quantities and of such description as \$15,000 would have purchased at the death of the testatrix, and the income arising therefrom should be paid to the husband of the testatrix, who survives

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her, so long as he shall live. And if \$15,000 will not, at this time, purchase as many bonds as it would have done at the death of the testatrix, of the description determined by the executors, they are at liberty to use moneys of the estate to pay any excess of premiums on such purchase or purchases.

The contest in the surrogate's court over the probate of the will should not avail to deprive the husband of the testatrix of any part of the substantial benefit she intended that he should receive under her will. And upon a similar ground the husband should not altogether lose the income which such investment would have realized from the death of the testatrix, if it had then been, as it was directed to be, made. The estate has had the advantage of these moneys, which the executors have received and retained as assets of the estate. And the aged husband of the testatrix is entitled to receive out of the assets and moneys in the hands of the executors, interest at the rate of five per centum per annum upon the sum of \$15,000, from the death of the testatrix up to the time the investment of the principal sum shall be made. Such disposition I think is just, and accomplishes what the testatrix intended in her husband's behalf, whose welfare was clearly uppermost in her mind.

A contention has arisen as to who shall pay the funeral charges and expenses of the testatrix. This is not an agreeable feature in this litigation. It is claimed by some of the parties that the husband, and not the executors, must discharge the debts occasioned by the funeral and burial of his wife, and this notwithstanding the testatrix had a considerable separate estate. Ordinarily this would be a question of administration, and not one to be raised in an action for construction of the will. But the will of the testatrix itself puts the subject at rest, for she orders and directs in the first paragraph thereof, that all her debts and "funeral expenses" shall be paid. The duty, therefore, is cast upon the executors to pay these charges. Although it may be true that the duty of burying the body of his deceased wife rests upon her husband,

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yet a wife may charge, through her last will and testament, her own separate estate with the expenses of her funeral. In *McCue agt. Ganey* (14 *Hun*, 562) it was in substance decided that a husband, upon the settlement of his accounts as administrator of the estate of his deceased wife, should be allowed out of her estate for her necessary and proper funeral charges paid by him. The fact that it is the duty of the husband to bury his deceased wife does not exempt her separate estate from the ultimate charge (*Redfield's Law and Practice of Surrogates' Courts*, 453).

By the fifth paragraph of her will, the testatrix gave to her nephew, Simeon B. Johnson, from and after the death of her husband, one equal thirteenth part of \$14,000, together with a like share of her household furniture, immediately after her decease.

By the sixth paragraph of her will she directs her executors to sell and dispose of her real estate at such times as they may think proper, and of the proceeds she gave to her afore-mentioned nephew, Simeon B. Johnson, the sum of \$5,000. These gifts are afterwards qualified, and practically cut down by the provisions contained in the thirteenth clause, in which the testatrix provides that in case one or more of the several persons to whom legacies were given should die in her lifetime, "or before the time when such money should become payable to them respectively," leaving lawful issue living at the time of her death or at the time when the said money or legacy should become payable to them respectively, then she directs that the money or legacy given or directed to be paid to one so dying shall go to and be paid to his or her lawful issue then surviving.

At the time of the death of the testatrix, Simeon B. Johnson, the legatee above named, was living, and he survived her some months, when he died leaving a widow and several children him surviving. Before his death Simeon B. Johnson made and executed a last will and testament, in which he gave all his interest under the will of the testatrix to his wife by a

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second marriage. The children he left him surviving were by a former marriage, and were all in being at the death of the testatrix, to whom they were in relationship by blood. The children of Johnson, notwithstanding, claim to be entitled to the legacies contained in the will in favor of their father, and their claim is opposed by the executors under Johnson's will, who affirmatively demand the same to be administered in pursuance thereof. This contention is ended when it is determined what interest Simeon B. Johnson had in the substance of these legacies at his death. His will undoubtedly carried his interest in the household furniture of the testatrix; to that he was entitled at her death.

For the purpose of paying legacies created by the sixth clause of the will the real estate of the testatrix was directed to be sold. This was an equitable conversion out and out of the real estate into personalty, and the gifts are therefore gifts of money. It is, however, urged by the counsel for the children of Simeon B. Johnson, that he died before this legacy was payable, and that by force of the thirteenth paragraph of the will, being a later expression and direction of the testatrix, the children, and not the executors under Johnson's will, take this gift. No time was fixed by the will for the payment of this legacy. It could not be paid, nor in any view was it payable before an actual sale of the realty, to produce the fund to discharge it. But the time of sale was in the discretion of the executors. For certain purposes, doubtless, the conversion is presumed to have taken place at the death of the testatrix. But payment could not be demanded until an actual sale had taken place. It does not appear when the real estate was sold; but the time of actual sale I do not think important. It is not, however, probable that there was a sale until after the probate of the will, which took place on the 31st August, 1880, and Johnson died before that date.

In the absence of any time fixed by the testatrix for the payment of this legacy, she is presumed to have made her will with reference to existing laws.

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The common law rule was that, where the will failed to fix a time of payment, the legacy was due and payable on the expiration of one year after the death of the testator. But by the Revised Statutes legacies are payable only after the expiration of a year from the granting of letters, unless an earlier time is fixed by the will. The statute is in form prohibitory (2 *R. S.*, 90, *sec.* 43; *Bradner* agt. *Falkner*, 12 *N. Y.*, 473).

As Johnson died before the probate of the will, and before the legacy was payable, his executors cannot claim this gift of \$5,000, but the children, to whom on such contingency it was limited, are entitled to this sum.

Whatever interest Johnson had under the will of the testatrix was liable to be, and was, in fact, terminated by his death before the legacy was payable.

The intentions of the testatrix, as shown by the will, must be carried out. And the result reached is clearly in harmony with such intentions, as it directs the fund in question into channels clearly designed by the testatrix. It goes to the children of Johnson, who were in *esse* before the death of the testatrix, and who were clearly within her contemplation when she made her will, in the event that their father should die before the legacy was payable to him. And for a like reason the gift of the one-thirteenth part of \$14,000, given to Johnson by the fifth clause of the will, goes to his children, as it was payable only after the death of the husband of the testatrix, and he still lives. In this case it seems quite clear that the testatrix has made the time of payment a substantial part of the gift.

Eliza Totten, to whom legacies were given by the testatrix in the fifth and sixth clauses of the will, having died without issue, in the lifetime of the testatrix, those legacies lapse.

As the legatee was not a descendant of the testatrix, the legacies are not saved by the statute (2 *Rev. Stat.*, 66, *sec.* 52; *Van Beuren* agt. *Dash*, 30 *N. Y.*, 393).

Where a legacy lapses it falls into the residuum. In case

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there is no residuary bequest, it goes to the next of kin as estate undisposed of by the will (*Banks* agt. *Phelan*, 4 *Barb.*, 80; *Betts* agt. *Betts*, 4 *Abb. N. C.*, 421).

The sixth clause was intended by the testatrix to embrace and distribute the residue of her estate, and may properly be considered the residuary clause. Yet that clause excepts from its operation the sum of \$15,000 directed to be kept invested during her husband's life and for his benefit, as it does her household furniture, wearing apparel and jewelry. To the extent, therefore, that the gifts of the testatrix of any part of that money or property to Eliza Totten fail, the testatrix died intestate.

But with respect to the sum of \$2,000 given by the testatrix to Eliza Totten by the sixth clause of her will, and which has lapsed, I think that the clause, in connection with the twelfth, will carry and distribute the sum so lapsed. The language is quite sufficient for the purpose; it operates upon "all the residue of her estate of every kind," with the exception above alluded to, and distributes the same to several legatees — not as a class, but *nominatum*, a specific sum to each.

Thus much for the sixth clause; but the twelfth clause provides that if there be a surplus, that each of the sums given shall be increased in the proportion of their respective amounts to such surplus.

I am of opinion that such is the true construction of the sixth clause, as amplified by the twelfth, and that it is in accord with the intentions of the testatrix, and that the lapsed legacy of \$2,000 must be applied to increase the shares of the other legatees in that clause mentioned, in proper proportions.

And as to the legacy in favor of Eliza Totten, created by the fifth clause of the will, and which lapsed, the same is to be paid and distributed to and among the person or persons entitled to receive the same, as provided in the statute in case of intestacy.

The fourteenth clause of the will is in these words: "In

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case any one or more of the persons to whom I have hereby given or bequeathed any legacy or any portion of my estate, shall make any opposition or controversy in any court of law or otherwise, in relation to the validity of this my will and appointment, or in relation to any of the legacies or other matters therein contained, each and every person so making such opposition or controversy shall thereby forfeit every portion of my estate hereby given or bequeathed to him or her, and he or she shall be excluded from all participation in my said estate in any manner whatever."

It is now claimed that as certain of the legatees opposed the probate of the will in the surrogate's court, they have forfeited the legacies in their favor. Clauses in wills which impose restraints upon proper inquiry into testamentary capacity and the legality and validity of dispositions of property should not be favored.

The clause in question is very broad, and if allowed to stand in its length and breadth I am not sure but that it would prohibit a legatee from suing for his legacy, as it might involve a controversy about the will, or from taking part in any litigation in which the will, "legacies or other matters therein contained," might be properly brought in question, as it would put in jeopardy whatever benefit the will secured to him. A clause in some respects similar to the above was under consideration in *Rhodes agt. The Munswell Hill Land Co.* (20 *Beaven R.*, 560), and it was held to be absurd, inconsistent and repugnant. It has been held in times quite early that a condition of this kind attached to a bequest of personalty where there was no gift over to a third person is not obligatory, but in *terrorem* only, and if there is *probabilis causa litigandi* there will be no forfeiture (1 *Roper on Legacies* [2 *Am. ed.*], 795; 1 *Jarman on Wills* [3 *Am. ed.*], 713, *m. p.*, 850; 2 *Williams on Ex'rs*, 1093; *Powell agt. Morgan*, 2 *Vernon*, 90; *Morris agt. Burroughs*, 1 *Atkins*, 404; *Lloyd agt. Spillet*, 3 *Peere Williams*, 345).

I cannot say that the opposition to the probate of the will

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was not interposed in good faith, or that it was vexatious. In fact, I think there was probable cause to justify an inquiry into the testamentary capacity of the testatrix. She had once been adjudged — in a proceeding instituted for the purpose of inquiring into her mental condition — of unsound mind, and a committee of her person and estate had been appointed. The result in the surrogate's court, however, upheld the will. I do not think that the persons who took part in such opposition have forfeited their legacies, but are entitled to receive the same.

Findings of fact and conclusions of law in pursuance of the above must be prepared by the attorney for the plaintiff, and a copy thereof, with notice of settlement before me of five days, must be served upon each of the parties who have appeared in this action.

COURT OF APPEALS.

CHARLES DUSENBURY, appellant, agt. WILLIAM S. KEILEY
as receiver, &c., respondent.

False imprisonment — Statute of limitations, from what time it begins to run — Malicious prosecution.

The plaintiff was arrested on November 15, 1876, under a Stilwell warrant, and was released from custody on giving bonds for his appearance. The warrant was dismissed and set aside on February 3, 1877. The general term, on January 7, 1878, reversed such dismissal and ordered that the proceedings "be and the same hereby are revived and restored." At the close of the revived proceedings, a new order was made that defendant (plaintiff here) be rearrested. The new warrant was never served, the court of appeals having, in April, 1879, reversed the order directing it, and pronounced the original arrest illegal. The plaintiff, in July, 1879, began this action for false imprisonment:

Held, 1. That plaintiff's imprisonment ended on the vacation of the Stilwell warrant in February, 1877, and his cause of action for false imprisonment was then complete; and not having been brought within the two years limited by the statute, was wholly lost.

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2. The plaintiff having, after the revival of the proceedings, voluntarily appeared, no compulsion being used, and by his appeal to the courts having prevented his threatened rearrest, there was no new imprisonment; and the proceedings following his discharge in February, 1877, did not amount to a continuance of the original imprisonment.
3. If the plaintiff had sued for a malicious prosecution, either by itself or in addition to his claim of false imprisonment, the result might have been different.

Quære — Could this action be maintained against the defendant as receiver? in other words, in his official capacity; as the acts of the receiver, as such receiver, are the acts of the court, and as such the court cannot commit an assault and battery or false imprisonment.

May, 1881.

THIS action was brought in the court of common pleas for the city and county of New York, to recover damages for false imprisonment. At the trial, before hon. chief justice DALY and a jury, the complaint was dismissed upon the ground that the cause of action was barred by the statute of limitations. Thereupon a motion was made for a new trial upon the judge's minutes, which was denied. Judgment was accordingly entered on December 11, 1879, and on the same day an order was entered denying said motion. An appeal was taken from said judgment and order to the general term of said court, which affirmed the same (*See* 58 *How.*, 256). This appeal is taken from said judgment of affirmance. The facts out of which the cause of action for false imprisonment grows, are as follows: On the 14th day of November, 1876, counsel for William S. Keiley, as receiver of the property and effects of one Selah Hiler, presented to Hon. GILBERT M. SPEIR, as one of the justices of the superior court of the city of New York, the affidavit of Mr. Linus A. Gould, dated October 25, 1876, and the exhibits thereto attached. Thereupon, under and pursuant to an act of the legislature, entitled "an act to abolish imprisonment for debt, passed April 26, 1831," and the acts amending the same, said justice SPEIR issued a warrant in the name of the people of the state of New York to the sheriff of the city and county of New

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York, commanding him to arrest the plaintiff, Charles Dusenbury, and bring him before said justice, to be further dealt with according to law. Thereafter, and on the 15th day of November, 1876, the said sheriff appeared before said justice with the plaintiff, Dusenbury, along with Hall & Blandy, his attorneys, and also D. M. Porter, Esq., counsel for said William S. Keiley, and the sheriff did then and there make the following return to the said warrant: "Defendant arrested and produced herewith. William C. Connor, sheriff." And thereupon, and on said last named day, the plaintiff, Dusenbury, by his said attorneys, objected to the regularity of the proceedings, the jurisdiction of the court, and the sufficiency of the papers on which the warrant was issued, and afterwards and in accordance with the provisions of said act, interposed an affidavit verified by his oath, controverting the facts upon which the said warrant was granted. And also gave the recognizance and bond as provided by said act, and thereupon the further hearing in the matter was adjourned to the 25th day of November, 1876. On said 25th day of November, 1876, said plaintiff, Dusenbury, with his attorneys, and also counsel for said William S. Keiley, appeared before said justice, who then and there proceeded to hear the allegations and proof produced in support of said warrant, the same being voluntarily produced by counsel for said Keiley, all of said proof being documentary evidence, and consisting of the following described documents, papers and proceedings, to wit: I. The judgment roll in the action in said superior court, William S. Keiley, as receiver, against Charles Dusenbury, dated 25th of January, 1876. II. The order for examination of judgment debtor in the same action, and the examination of the judgment debtor thereunder. III. The printed case on appeal (*Randall* agt. *Dusenbury*, as trustee). IV. The printed summons and complaint in an action in said superior court (*Dusenbury* agt. *Randall et al.*) Immediately upon said papers and proceedings being offered in evidence, counsel for said plaintiff, Dusenbury, objected to their admis-

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sibility as incompetent — they were admitted in evidence, subject to their legal effect, to be thereafter discussed — the complainant rested his case and a further adjournment was taken to December 1, 1876, and on said last-named date a further adjournment was taken to December 8, 1876. On said December 8, 1876, all of said parties again appeared before said justice, and counsel for this plaintiff, Dusenbury, elected not to introduce any testimony on his part, but to rest on the case as it then stood, and to move for a dismissal of the warrant at such time to which the proceedings might be adjourned, and at the same time said D. M. Porter, Esq., on behalf of said William S. Keiley, decided not to offer any further proof, and thereupon said case was finally submitted, and was further adjourned to the 11th December, 1876, for summing up. On the 11th day of December, 1876, the matter was again adjourned to December 15, 1876, when a further adjournment was had to the 26th day of December, 1876, for final judgment. On the 26th day of December, 1876, counsel on behalf of said plaintiff, Dusenbury, moved a dismissal of said warrant, and subsequent proceedings thereon, and argued in support thereof, and counsel appeared on behalf of said William S. Keiley as receiver, and argued in opposition to said motion, and for the committal of said plaintiff, Dusenbury, and each counsel submitted written points, and said justice reserved his decision until the 15th day of January, 1877. On the said 15th day of January, 1877, said justice rendered his decision in the words and figures following: "The warrant in this case should not have been granted." Afterwards, on the 17th day of January, 1877, on the application of counsel for said Keiley, and upon his affidavit sworn to on the 17th day of January, 1877, and upon the other papers therein referred to, said justice granted an order to show cause, returnable on the 19th day of January, 1877, why there should not be a rehearing and reargument in the proceeding, and why the plaintiff therein (Keiley) should not have leave to examine the defendant,

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therein (this plaintiff) or put in other proof, and why the proceedings subsequent to the submission of the matter to said justice should not be vacated and set aside, and stayed all proceedings on the part of the said defendant (this plaintiff) in the meantime. On the 19th day of January, 1877, the matters referred to in said order to show cause were adjourned at request of Keiley's counsel, to January 22, 1877, at said time and place; and on said 22d day of January, 1877, they were further adjourned at like request to January 25, 1877. On the 25th day of January, 1877, a counter affidavit was interposed on behalf of said Dusenbury, and arguments were made on behalf of both plaintiff and defendant on said order to show cause, and said justice reserved his decision until the 1st day of February, 1877, when he made and rendered his decision thereon on the whole cause in the words and figures following, that is to say:

"I have carefully examined the points presented by the counsel for the plaintiff on his reargument of the case relating to proceedings under the Stilwell act, and can see no reason for changing the views heretofore expressed. The motion must be denied, with costs." On the 3d day of February, 1877, the parties appeared before said justice by their respective counsel, on notice of settlement, whereupon said justice made, and there was entered in the clerk's office of said superior court, an order on said decision, dated the 3d day of February, 1877, vacating and setting aside said warrant, and exonerating the bail from liability, and awarding costs. Thereupon the cause was, on the application of said Keiley, removed by *certiorari* to the general term of the supreme court, held in the first department, and said general term, on the 15th day of October, 1877, reversed said judgment and order in said matter, and remitted the same to respondent, as a justice of said superior court, to be further proceeded with according to law, which said order was made the order of the superior court of the city of New York, by an order of said justice SPEIR, dated 7th of January, 1878. And thereafter, on or

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about January 15, 1878, the matter came on for hearing before said justice, and was from time to time adjourned until April 8, 1878, when the same was finally disposed of by said justice, on the same evidence as was produced and read on the first hearing; and said justice decided that the creditors' allegations were sustained, and that the said Dusenbury (this plaintiff) had done each and every of the acts alleged in the affidavit of Linus A. Gould, upon which said warrant was issued; and ordered that said Dusenbury be committed to the jail of the county of New York, in the city and county of New York, to be there detained until he should be discharged according to law. Thereupon the cause was removed on application of said Dusenbury by *certiorari* to the supreme court, general term, held in the first department, and said general term, on the 7th day of January, 1879, "ordered and adjudged that the order of the said justice SPIER, and the proceedings therein by the said justice, be in all things affirmed." Thereupon an appeal was taken by Dusenbury to the court of appeals from such last-mentioned order, and from the order of said general term first above referred to. Said appeals were duly argued and submitted, and after due deliberation had thereon, said court of appeals, on the 25th day of April, 1879, ordered and adjudged that the order of the general term of the supreme court and the warrant of judge SPEIR for the arrest of said Charles Dusenbury, dated 14th November, 1876, and all proceedings had thereunder, be and the same were thereby vacated and set aside upon the ground and for the reason that said justice never had any jurisdiction in the matter (*See Court of Appeals decision*, 57 *How.*, 274). The said judgment and proceedings were remitted to the supreme court, and thereupon, upon May 28, 1879, an order of the supreme court was duly made and entered upon said remittitur making the said judgment of the court of appeals the judgment of said supreme court, and vacating and setting aside said order and warrant and all subsequent proceedings thereunder. Within six weeks from said last-named order, to wit, on July 7th,

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1879, this action was commenced to recover damages for such false imprisonment. The case was tried before Hon. CHARLES P. DALY and a jury, on October 22, 1879, and resulted in a dismissal of the complaint, upon the ground that the cause of action was barred by the statute of limitations, and on that ground alone. The only question presented on this appeal, therefore, is whether the cause of action was barred by the statute of limitations at the time the action was commenced. Defendant's counsel claims that inasmuch as plaintiff gave his bond, and thereupon was discharged from actual custody on the 15th day of November, 1876, and has not been in actual custody since that date, and this action not having been commenced until more than two years thereafter, to wit, July 7, 1879, that the statute of limitations is a bar to this action, and the justice held that the action should have been brought within two years after plaintiff was first discharged by judge SPEIR, which was February 3, 1877. While we, on the other hand, insist that the plaintiff Dusenbury was originally arrested on November 15, 1876, and continued under legal arrest until his acquittal on the 3d day of February, 1877, and that as soon as that acquittal was reversed by the supreme court, general term, and its order and that of judge SPEIR founded thereon, dated respectively 15th October, 1877, and January 9, 1878, this plaintiff again became rearrested in contemplation of law under the original warrant, and continued in constructive imprisonment afterwards and continuously down to and including the final decision and entry of the judgment of the court of appeals and supreme court order founded thereon reversing the conviction, which was in April and May, 1879. In which event the present action was brought in time, as it was commenced within six weeks thereafter.

Hall & Blandy, for appellants.

I. Actual imprisonment is not necessary to constitute an imprisonment (*Brushaben agt. Hegeman*, 22 Mich., 266; *Hawk agt. Ridgway*, 33 Ill., 473). Any restraint put upon

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the freedom of another by show of authority or force, is sufficient to constitute an imprisonment (*Warner agt. Riddiford*, 4 C. B. [N. S.], 206). It is not necessary for the plaintiff to show that the defendant used violence, or laid hands on him, or shut him up in jail or prison to sustain an action for false imprisonment. It is sufficient to show that the defendant at any time or place, in any manner restrained the plaintiff of his liberty or detained him in any manner from going where he wished, or prevented him from doing what he desired (*Hawk agt. Ridgway*, *supra*; *Smith agt. State*, 7 *Humph.*, 43). If a person is arrested and threatened with imprisonment upon a void writ in a civil action, and is compelled to promise and procure the promise of others that he will not abscond, and is subjected to expense in procuring an order to set aside the writ, he may recover for this interference with his person and restraint of his liberty, although he is not actually imprisoned (*Bonesteel agt. Bonesteel*, 28 *Wis.*, 245; 30 *Wis.*, 511). If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used; for the party addressed feels that he has no option, no more power of going in any but the one direction presented to him, than if the constable or bailiff had actual hold of him, and it is that entire restraint upon the will which constitutes the imprisonment (*Williams, J., Bird agt. Jones*, 72 *B.*, 743; 2 *Inst.*, 589; *Bull* [N. S.], 62). "If you put your hand upon a man, or tell him he must go with you, and he goes, supposing that you have the right and the power to compel him, that is an arrest" (*Tindal, C. J., Wood agt. Lane*, 6 C. & P. 774; 3 *Allen*, 495; *Lansing agt. Case*, 4 *N. Y. Leg. Obs.*, 221; *Searle agt. Veits*, 2 *N. Y. Sup.* [T. & C.], 224). A demonstration looking to an arrest, which, to all appearances, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished

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without such submission (*Brushaben* agt. *Hegeman*, 22 *Mich.*, 266, *supra*; *Ahern* agt. *Collins*, 39 *Mo.*, 145; *Murry* agt. *Chase*, 100 *Mass.*, 79; *cases cited above*, and *Johnson* agt. *Tompkins*, 1 *Baldw.* [*C. C.*] 571). GOULD J., held, in *Doyle* agt. *Russel* (30 *Barb.*, 305): "It has been held by high authority that if cruelty, malice and oppression appear to have occasioned or aggravated the imprisonment, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of a justification the most technically regular (1 *Term R.*, 536, 537). From this *Espinasse*, in his *Digest* (p. 332), quotes as a principle: 'Though the original arrest might be warrantable, yet, for any subsequent oppression or cruelty, this action (false imprisonment) lies'" (*See Decker* agt. *Jackson*, 16 *N. Y.*, 443; *Winter* agt. *Kinney*, 1 *N. Y.*, 365).

II. The effect of the general term order reversing the acquittal and the order of the justice founded thereon, directing plaintiff to appear before him on the 15th day of January, 1878, was to revive the warrant and restore the parties to the position they were in prior to said acquittal (*Robinson* agt. *Plympton*, 25 *N. Y.*, 484; *Wright* agt. *Rowland*, 4 *Abb. Ct. App. Dec.*, 649).

III. In an action for false imprisonment every continuance of the imprisonment, *de die in diem*, is, in point of law, a new imprisonment, and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of the issuing of the warrant (*Hardy* agt. *Ryle*, 9 *B. & C.*, 608; *Massey* agt. *Johnson*, 12 *East.*, 68; *Bennett* agt. *Brown*, 20 *N. Y.*, 99; *Ball* agt. *Gardiner*, 21 *Wend.*, 270; *Addison on Torts*, and *cases cited*).

IV. We respectfully submit that the opinion of the general term, by his honor judge VAN BRUNT (59 *How.*, 286), does not satisfactorily dispose of the question involved. The case is one of great hardship to the plaintiff, and this action was brought to requite him for his outlay in maintaining a successful appeal to this court, after meeting with every species

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of defeat below (*See People ex rel. Dusenbury agt. Speir*, 77 *N. Y.*, 144). And in case of recovery against the defendant in this action, the damages will be paid out of a fund contributed by this very plaintiff, and which is now held by this defendant, to await the final result of this action (*See Morris agt. Hiler*, 57 *How. Prac. Rep.*, 322).

D. M. Porter, for respondent.

I. This action cannot be maintained against the defendant as receiver, in other words, in his official capacity, because the acts of a receiver, as such receiver, are the acts of the court, and as such the court cannot commit an assault and battery or false imprisonment. Neither will the court in such a case permit itself to be made a suitor in a court of law (*Field and ors.*, agt. *Jones and ano.*, 11 *Geo.*, 413 [417]). This defendant, although acting as receiver in obtaining the judgment and seeking to enforce it, cannot be held liable as such receiver for this false imprisonment, because the court of appeals held the warrant under which the plaintiff was arrested was wholly without jurisdiction and void (*The People ex rel. Dusenbury agt. Spier*, 57 *How.*, 275). Consequently the Stilwell warrant was no justification, *i.e.*, it was an active, wrongful and personal misconduct on his part, for which he was personally liable, and he cannot be held liable as receiver. The defendant was appointed receiver by the court of common pleas, and he instituted the Stilwell act proceedings and procured the warrant in the superior court, which court had no jurisdiction over the proceedings; in other words, there was no law authorizing the proceedings complained of in that court, consequently the defendant did not act within the scope of his authority, nor in the business of his receivership, nor under any order of the court, because the act being illegal from its inception it was a willful assault, and is distinguishable from the cases of *Camp agt. Barney* (4 *Hun*, 373) and *Cardot agt. Barney* (63 *N. Y.*, 281). The suggestion that the intent to institute the Stilwell act proceedings was to increase the fund

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to satisfy the judgment creditor's claim cannot avail, because the act was "willful" and illegal, which is the dividing line (*Wright* agt. *Wilcox*, 19 *Wend.*, 342 [343, 345]; *Levin* agt. *Russell*, 42 *N. Y.*, 251; *Fraser* agt. *Freeman*, 43 *N. Y.*, 566). It was misconduct on the receiver's part. It was not any part of his duty as such receiver to do an illegal act. Any attempt to increase the estate without lawful authority was misconduct on his part, for which he would be only personally liable (*Levin* agt. *Russell*, 42 *N. Y.*, 251; *Fraser* agt. *Freeman*, 43 *N. Y.*, 566). "No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends" (*Harrington* agt. *The People*, 6 *Barb.*, 607). This was not a question of excess of jurisdiction, but of total want of jurisdiction. An act done where the court has no jurisdiction is a nullity (*Shriver's Lessee* agt. *Lynn*, 2 *How.* [U. S.], *R.*, 43). Even a judgment, where the facts do not show jurisdiction, would be void (*Kelly* agt. *Archer*, 48 *Barb.*, 68). A receiver, "when appointed, becomes the officer of the court, bound to obey their orders and directions, and money or estate in his hands is regarded as being in the custody of the law" (*Deven-dorf* agt. *Dickinson*, 21 *How. Pr.*, 275). At most, where ministerial duty is violated, the officer, although for most purposes a judge, is still civilly liable for such misconduct, but he is so liable in his individual, not in his official capacity (*Blythe* agt. *Tompkins*, 2 *Abb. Pr.*, 468 [472]; *Wilson* agt. *The Mayor, &c., of New York*, 1 *Denio*, 595 [599]). "The question is whether the proceedings are void on their face" (*Blythe* agt. *Tompkins*, *supra*). Under the decision of the court of appeals, not only had the court no jurisdiction, but the whole proceedings were void, that is, a nullity. "Good faith does not excuse the defendant for causing the plaintiff's arrest on a process that charged him with no offense against the laws of his country" (*Blythe* agt. *Tompkins*, *supra*, 472). Apply these principles to the case at bar and the defendant is not liable officially, and there is no cause of action against him as receiver.

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II. The plaintiff, on November 15, 1876, gave his bonds for, and was discharged from imprisonment, and the justice finds "that the said defendant, Dusenbury (plaintiff herein), has been released from the custody of the sheriff, &c., on giving the bonds required by the statute." Bonds were given only once, on November 15, 1876. In addition to that, the judge having charge of the proceedings, by his judgment duly entered, discharged him and his bail on February 3, 1877. That put an end to the imprisonment more than two years before the commencement of this suit (July 7, 1879), therefore this action cannot be maintained (*Sec. 384 of the Code*). And this is especially so, as the bonds under which he was discharged, November 15, 1876, could not have been enforced (*Broadhead agt. McConnell*, 3 *Barb.*, 175; *Homan agt. Brinckerhoff*, 1 *Denio*, 184; *Cadwell agt. Colgate*, 7 *Barb.*, 253; cited with approval, and reaffirmed in *Coleman agt. Bean*, 32 *How.*, 370, 381; *S. C.*, 3 *Keyes*, 97). An action will lie at once for an arrest under a void Stilwell act proceeding, without any reversal of the proceedings (*Collamer agt. Elmore*, cited and affirmed in *Mosher agt. The People*, 5 *Barb.*, 575, 577). The bonds were given on November 15, 1876, and there was only one set of bonds given, under which, as before said, Mr. Dusenbury's imprisonment ended on November 15, 1876, and not only was the plaintiff, Mr. Dusenbury, discharged on February 3, 1877, by the judgment of judge SPEIR, but the bail were also discharged. In any event, this cause of action did not accrue later than that day. We have shown that the bonds could not have been enforced, and having been given in a void proceeding, his appearance was consequently voluntary (*Watts agt. Willett*, 2 *Hilt.*, 212; *The People ex rel.*, &c., agt. *The Justices*, &c., 74 *N. Y.*, 406).

FINCH, J.—This action was for false imprisonment, and was successfully defended upon the ground that the time limited for its commencement had expired.

The plaintiff was arrested under what is known as the Stil-

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well act, on the 15th day of November, 1876. He alleges in his complaint that arrest, his imprisonment in the office of the sheriff for several hours, his removal to the superior court, where he was also imprisoned for several hours, and then that he was detained and restrained of his liberty under and by force of the proceedings instituted, until about the 26th day of April, 1879; and that such arrest was illegal and unauthorized and without reasonable cause. The original imprisonment and its illegality are not now disputed. It is claimed, however, on the part of the defendant, that such arrest and imprisonment terminated on the 3d day of February, 1877, and at that date the warrant was dismissed, vacated and set aside, the bail given by the plaintiff exonerated, and he himself discharged from custody and set at liberty. That fact is proven by the production of the decision and order of the justice of the superior court, before whom the proceedings were pending, and which terminated them in the manner and with the effect described. When this order was made the plaintiff's imprisonment ended. He went out of court entirely free, no longer in custody, in no respect restrained of his liberty. The original warrant had spent its force, had accomplished its wrong, had been vacated and annulled, and become dead process. A complete and perfect cause of action for the false imprisonment had arisen, and could at once have been maintained. It was not brought within the time limited by the statute, and hence was wholly lost, and incapable of being enforced, unless subsequent events affected and changed the result. Such is the contention of the plaintiff, and to sustain it he relies upon the following facts: After the discharge in February, the present defendant, by writ of *certiorari*, removed the proceedings into the supreme court, and at a general term thereof, held on the 15th of October, 1877, the determination of the superior court was reversed, and an order entered directing such reversal, and that "the said proceedings had before the respondent, HON. GILBERT M. SPEIR, as a justice of the superior court of the city of New York,

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be and the same hereby are revived and restored." On the 7th day of January, 1878, this order of reversal was made an order of the superior court, and it was also directed that Dusenbury be "required to appear under the original warrant and proceedings," and that his bail produce him on the 15th day of January, 1878, for further proceedings according to law.

Up to this date it is quite evident that, since the February preceding, and for almost an entire year, the present plaintiff had been wholly free from imprisonment, entirely at large, and in no manner restrained of his liberty. The original imprisonment, therefore, was certainly not continuous beyond the discharge which ended it. When the last order was made he was under no arrest or restraint whatever. At the appointed time he appeared in the superior court. That appearance, so far as the evidence shows, was voluntary. Its purpose was to defend himself against a possible rearrest, and prevent any new imprisonment.

At the close of the revived proceedings a decision was made adverse to Dusenbury, and the order thereupon entered directed "that a commitment be issued to the sheriff directing that he, as such sheriff, rearrest such defendant Charles Dusenbury, and that said defendant Charles Dusenbury be committed to the jail of the county, to be there detained until he shall be discharged according to law." This order recognized that Dusenbury was not under arrest, that the original warrant was spent and had become dead process, and directs a new warrant and a new arrest under it. That new warrant was never served, and the new arrest was never made. The order directing it, affirmed by the general term, was reversed in this court, and the original arrest pronounced illegal and without authority. That ended the controversy. Dusenbury, by his appeal to the courts, prevented the threatened rearrest, and from the time of his first discharge he was never at all imprisoned or put under restraint.

He claims, however, to maintain his action upon the ground

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that the proceedings following his discharge were coercive, and amounted to a continuance of the original imprisonment. We cannot so regard them. If the proceedings continued, the imprisonment did not. After the reversal by the general term Dusenbury appeared, as his counsel testifies, by request. No compulsion of any sort was applied. He might have put his prosecutor and the court to the test. He might have waited a new arrest, but chose rather to prevent it than to defy and punish it. He says his bonds remained; but they had been discharged and were absolutely void (*Caldwell* agt. *Colgate*, 7 *Barb.*, 253; *Homan* agt. *Brinckerhoff*, 1 *Den.*, 184; *Coleman* agt. *Bean*, 3 *Keyes*, 97). The whole proceeding was without authority and illegal (*Dusenbury* agt. *Keiley*, 57 *How.*, 274). Certainly, therefore, after the actual discharge, the present plaintiff was in no manner restrained of his liberty. The pending proceedings, the war on paper, divorced from any personal restraint, could not coerce him, for they were without authority and powerless, and did not coerce him, as he submitted to them only to resist their legality, and did that voluntarily and not upon any compulsion.

It is argued that by the order of reversal of the general term the original warrant and arrest were "revived and restored." Not at all. It was only the proceeding, the litigation, the prosecution, that was revived and ran on to its final determination. We do not see how that order could have the effect to revive an imprisonment which had ended, any more than a similar order could have revived a past assault and battery. There could be a new arrest and a new imprisonment. The original warrant had exhausted its power and its office. It had become dead process, and could not be revived or continued in force. To put the party again under arrest or restrain his liberty required a new exercise of judicial power (*Wood* agt. *Dwight*, 7 *John. Ch.*, 295; *People ex rel. Roberts* agt. *Bowe*, 81 *N. Y.*, 45). The court and the prosecutor understood this fact. The new order made after the reversal and at the close of the second hearing proceeded on the

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assumption, which was entirely sound, that the old warrant was exhausted and Dusenbury at liberty, for it ordered the issue of a new commitment, by force of which he should be again taken into custody. If that commitment had been executed, there would have been a new arrest, a new false imprisonment, a new cause of action, not a continuance of the first one. But the new trespass was not committed. The whole proceeding was reversed without, in the meantime, any interference with the personal liberty of the party assailed.

But it is said he thought he was coerced; he believed it was necessary to obey the orders of the court, and so was under a sort of constructive compulsion. That can hardly be said of one who, through his counsel, is denying the jurisdiction of the court and insisting that its orders are illegal. But if otherwise, the result sought would not follow. In *Warne* agt. *Constant* (4 *John.*, 32) the prisoner stayed on the jail liberties after a supersedeas, under a mistaken idea that his liberty was not regained until a formal discharge by the sheriff, and for that cause brought an action of false imprisonment. It was held that his detention was his own act, purely voluntary, and it mattered not that he was mistaken as to his rights.

If, as was suggested by the courts below, the plaintiff had sued for a malicious prosecution, either by itself or in addition to his claim for false imprisonment, as was the case in *Doyle* agt. *Russell* (30 *Barb.*, 305), upon which the appellant largely relies, the result might have been different.

It would be very just that plaintiff should have a remedy for the long prosecution which he had endured, but the remedy which the law gave him has been lost by his own delay, and cannot be restored to him.

The judgment must be affirmed, with costs.

All concur, except FOLGER, C. J., absent.

Lawson agt. Jones *et al.*

N. Y. COMMON PLEAS.

JUDSON LAWSON, plaintiff and appellant, agt. JOHN J. JONES
et al., executors of DAVID JONES.

Testimony of party dying after trial, is evidence on new trial—When testimony of party examined on former trial who is rendered incompetent by the death of his adversary may be read—Code of Civil Procedure, section 830.

A party who has been examined in the first trial, and who is rendered incompetent by the death of his adversary before the second trial, may have his testimony, given in such former trial, read at any subsequent trial.

The statute does not require that the testimony of the deceased party should be first offered.

The plaintiff was not allowed to read his own testimony taken on a former trial relating to personal transactions with the original defendant, who has since died, upon the ground that the jury having disagreed there had been no former trial:

Held, that, within the provision of section 830 of the Code of Civil Procedure, under which plaintiff claimed the right to read his testimony, the trial is concluded when the case is closed and submitted to the jury.

General Term, June, 1881.

Before DALY, C. J., J. F. DALY and BEACH, JJ.

Mr. Whitlock, for plaintiff.

Mr. Smith, for defendant.

J. F. DALY, *J.*—On the trial plaintiff attempted to read his own testimony, taken on a former trial, relating to personal transactions with David Jones, the original defendant, who has died since such former trial. This was objected to by defendant's counsel on the ground that there had been no former trial. The jury had disagreed on the former trial; but there was, nevertheless, a trial within the provision of

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section 830 of the Code of Civil Procedure, under which section plaintiff's counsel claimed the right to read his client's testimony.

The trial is concluded when the case is closed and submitted to the jury. By section 992 it is provided that, for the purposes of that article, a trial by a jury is regarded as continuing until the verdict is rendered. This is a manifest expression of the legislative construction that for all other purposes the trial is closed when the case is submitted. It has been held that such a trial entitles the ultimately successful party to a trial fee (*Hamilton agt. Butler*, 30 *Hun*, 36).

There is no substantial reason why the testimony taken in such a trial should not be read. The party was on the stand and could have been cross-examined, and the same opportunity for scrutiny and for contradiction existed as if the jury had agreed upon a verdict.

The objection taken on appeal that the testimony cannot be read by the stenographer who took it down on the former trial from his notes, but must be produced in the form of depositions reduced to writing and subscribed by the party, is not good. Such a rule would exclude all testimony taken in the manner authorized by law, and render the Code inoperative.

The section (830) of the Code covers the case claimed by plaintiff. A party who has been examined in the first trial, and who is rendered incompetent by the death of his adversary before the second trial, may have his testimony, given in such former trial, read at any subsequent trial. The statute does not require that the testimony of the deceased party should be first offered.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Hardenbrook *et al.* agt. Colson.

SUPREME COURT.

RICHARD HARDENBROOK *et al.*, respondent, agt. JOHN W. COLSON, appellant.

Bankrupt act — Discharge in composition proceedings — Effect of on a debt created in a fiduciary character.

A debt due from a factor for goods sold by him on commission is a debt created in a "fiduciary character," within the meaning of the bankrupt act of 1867, and is not cut off by a discharge in bankruptcy.

Fourth Department, General Term, March, 1881.

Before TALCOTT, P. J., SMITH and HARDIN, JJ.

THE defendant appeals from a judgment, entered in Steuben county, upon the verdict of a jury, taken at a court in that county. The plaintiffs were copartners in 1868 to 1876, at Bath, Steuben county, and delivered at divers times, articles of hardware, upon the agreement that the defendant should receive and sell them for plaintiffs, and pay over to the plaintiffs the moneys received upon the sales after deducting ten per cent for commissions to defendant for making such sales. The defendant failed to pay over sixty-six dollars and eighty-five cents. This action was brought to recover the same. The defense was: 1. That defendant did not receive the goods in a fiduciary character and was therefore discharged from the debt by a composition in bankruptcy, and a tender of the money in court representing the dividend under such composition; and, 2. A counter-claim of twenty dollars.

J. F. Parkhurst, for appellant.

I. The debt to plaintiff was not incurred by defendant while acting in a fiduciary character, within the meaning of the bankrupt act, and was discharged by the bankruptcy com-

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position. It is now a well settled law in this state at least, that the debt due from a factor to his principal, for goods sold upon commission, is discharged by a bankruptcy composition, or a discharge in bankruptcy (*Hennequin agt. Clews*, 77 *N. Y.*, 427). Before this question was finally settled by the court of appeals for this state, the decisions in this and other states were far from being uniform. Under the act of 1841, the supreme court of the United States held that a factor who received the money of his principal was not a fiduciary, within the meaning of that act (*Chapman agt. Forsyth*, 2 *How.* [*U. S.*] *R.*, 202). Soon after the passage of the bankrupt act of 1867, the question came up before judge BLATCHFORD, then holding the United States district court for the southern district of New York (*In re Seymour*, 1 *N. B. R.*, 27), whether such an obligation was discharged by a bankruptcy discharge, under the act of 1867. The court held that the rule laid down in *Chapman agt. Forsyth* (*supra*), by reason of a slight difference in the phraseology in the two statutes, did not obtain under the act of 1867, and this decision was afterward approved in the case of *Kimball* (2 *N. B. R.*, 204). This decision in the *Seymour* case was also soon afterward approved and followed by this general term in the case of *Whittaker agt. Chapman* (3 *Lansing*, 155), which is the only reported case in which this general term have passed on the question. The doctrine of the *Seymour* case was, however, not generally adopted as the correct construction of the law, a large majority of the courts holding that the rule laid down in *Chapman agt. Forsyth* (*supra*), was also the rule under the act of 1867 (*Grover & Baker agt. Clinton*, 8 *N. B. R.*, 312 — DAVIS; *Owsley agt. Cobin*, 15 *N. B. R.*, 490 — WAITE; *Keime agt. Graff & C.*, 17 *N. B. R.*, 319; *Woolsey agt. Cade*, 15 *N. B. R.* 238; 54 *Ala.*, 378; *Neal agt. Scroggs & al.*, 17 *N. B. R.*, 102 — HARLAN; *Cronin agt. Cutting*, 104 *Mass.*, 245; *Am. Law J.*, vol. 8, p. 35). It will be observed that three of the above decisions were by judges of the supreme court of the United States, sitting in the circuit court, and

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they uniformly adopted the rule laid down in *Chapman agt. Forsyth (supra)*. The case of *Neal agt. Scroggs & al.*, went to the supreme court of the United States (5 *Otto*, 708), and the court there followed the case of *Chapman agt. Forsyth*. Soon after the latter decision the same question came again before the district court for the southern district of New York, the same court which had decided the *Seymour* case, and the court then decided that the case of *Seymour* was overruled by the case of *Neal agt. Scroggs* (5 *Otto*), and adopted the rule laid down in the case of *Chapman agt. Forsyth (supra)* (*In re Smith & al.*, 18 *N. B. R.*, page 24). This question has lately come before our court of appeals in the case of *Hennequin agt. Clews et al.* (77 *N. Y.*, 427), and that court has decided that such debt is discharged by the bankruptcy composition.

II. The composition proceedings were absolute, and a subsequent payment or tender of the amount, to which plaintiffs were entitled under the composition, was not necessary to give effect to the composition (*Citing Revised Statutes of the United States*, section 5103; *Constitution*, section 2, art. 6; *In re James T. Hurst*, 13 *N. B. R.*, 455; *In re Lissberger*, 18 *N. B. R.*, 240; *Case of Kohlsaatz*, 18 *N. B. R.*, 574; *Case of Bailey et al.*, 19 *N. B. R.*, 75; *Deford et al. agt. Hewlett*, 18 *N. B. R.*, 518; *In re Rogers et al.*, 18 *N. B. R.*, 253; *In re Bailey et al.*, 19 *N. B. R.*, 77; *In re Haskell*, 11 *N. B. R.*, 164; *Wells agt. Lamprey*, 16 *N. B. R.*, 205; *In re Becket*, 12 *N. B. R.*, 201; *In re Shaffer et al.*, 17 *N. B. R.*, 116; *Bamberg agt. Stern*, 18 *N. B. R.*, 24)

M. Rumsey Miller, for respondent.

I. The facts alleged in complaint showed a breach of trust by defendant, and therefore a tort. The identical moneys here received were to be paid over (*Swift agt. Wylie*, 5 *Robertson*, 680, 684; and cases cited on page 684; *Barber agt. Sterling*, 68 *N. Y.*, 267, *et seq*; *Merwin agt. Playford*, 3 *Robertson*, 703). Where the obligation is to pay over specific

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proceeds, the action is a tort (*Robbins* agt. *Falconer*, 43 *N. Y. Superior Ct. Reports*, 11; *Jones & Spencer*, 371; *Duguid* agt. *Edwards*, 50 *Barb.*, 288; *Standard Sugar Refinery* agt. *Dayton*, 70 *N. Y.*, 486). Where the note given is the obligation of the debtor only, is not paid at maturity, the plaintiff still holds it and makes profert of it at the trial, the note does not extinguish the original demand, and defendant is still liable in the fiduciary capacity (*Shipman* agt. *Shafer*, 14 *Abb. Pr.*, 449, 456; *Nichols* agt. *Michael*, 23 *N. Y.*, 264, 272, 273; *Central City Bank* agt. *Dana*, 32 *Barb.*, 296, 298; *Pettengill* agt. *Mather*, 12 *Abb. Pr.*, 436). The above proposition is entirely settled and the original debt is not discharged (*Cole* agt. *Lachett & ano.*, 1 *Hill*, 516, 518; *Edwards on Bills and Notes* [2d ed.], *marg. pp.* 201, 234; *Higby* agt. *N. Y. & Harlem R. R. Co.*, 3 *Bosw.*, 497; *Nichols* agt. *Nuchael*, 23 *N. Y.*, 264, 272, 273). But even if the allegations in complaint as to receiving the money by defendant were immaterial, the defendant denied them and them alone in his answer, and thereby made them a material issue which he could not evade on the trial (*Ayres* agt. *O'Farrell*, 10 *Bosw.*, 143-145; *Livingston* agt. *Miller*, 4 *Selden*, 283, 289).

II. The court properly refused to direct a verdict for defendant as asked, because: (a.) A composition in bankruptcy could not be available here as a defense, except upon the theory of a tender before suit of amount due under composition, for it is of no effect until the terms are complied with by debtor, viz: payment of amount due under composition (*In re Beehet*, 12 *Nat. Bankruptcy Register*, 201). (b.) In this case defendant did not pay any money into court till on the trial. There was no proof of any—the answer contained no allegation of paying money into court. Such tender cannot be available unless defendant pay money into court and allege that fact in his answer (*Becker* agt. *Boon et al.*, 61 *N. Y.*, 317, 321; *Simpson* agt. *French*, 25 *How. Pr.*, 464, 465; *Gray* agt. *Green*, 9 *Hun*, 339; *Eddy* agt. *O'Hara*, 14

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Wend., 221). (c.) And an answer omitting this allegation does not state facts sufficient to constitute a defense, and plaintiff may avail himself of the objection on the trial (*Becker* agt. *Boon*, *supra*). (d.) Plaintiff does not waive his right to insist on the objection by going to trial where there are other issues in the answer (*Becker* agt. *Boon*, *supra*). The cases of *Sheridan* agt. *Smith* (2 *Hill*, 538), and *Knight* agt. *Beach* (7 *Abb. Pr.* [new series], 241), do not interfere with this position, because in *Sheridan* agt. *Smith* the plaintiff took issue by reply upon the tender, and case is put upon that point, and in *Knight* agt. *Beach* the answer only contained one defense, viz.: tender, and the decision there is put on that ground. (e.) Another fatal defect to the tender is that there is no allegation in the answer "that defendant has at all times been ready to pay," nor was there any proof of that fact in the case (*Roosevelt* agt. *Bull's Head Bank*, 45 *Barb.*, 579, 584; *Brooklyn Bank* agt. *DeGraw*, 23 *Wend.*, 342, 345; *Ayres* agt. *Pease*, 12 *Wend.*, 393; *Wilder* agt. *Seelye*, 8 *Barb.*, 408).

III. Even if there were a discharge in bankruptcy fully pleaded and proved by defendant in this case, it would not discharge the debt in this case (*Whittaker* agt. *Chapman*, 3 *Lans.*, 155; *In re Seymour*, 6 *Int. Rev. Rec.*, 61; *Argall* agt. *Jacobs*, 21 *Hun*, 114; *Talcott* agt. *Harris*, 18 *Hun*, 567; *Libbey* agt. *Strasburger*, 14 *Hun*, 120; 12 *Hun*, 658). (a.) A composition in bankruptcy is no more potent to bar creditors' rights to sue on a debt than a discharge in bankruptcy (*Libbey* agt. *Strasburger*, 14 *Hun*, 120; *Ansonia B. & C. Co.* agt. *New Lamp Chimney Co.*, 53 *N. Y.*, 123).

HARDIN, J.—It was decided by this department in *Whittaker, treasurer, etc.*, agt. *Chapman* (3 *Lansing*, 155), that a debt due from a factor for goods sold by him on commission, is a debt created in a fiduciary character, within the meaning of the bankrupt act of 1867, and is not covered by the debtor's discharge in bankruptcy. This case has not been

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overruled. It has been referred to and approved by subsequent cases. It was quoted by MILLER, J., in *Barber* agt. *Sterling* (68 *N. Y.*, 273; *see, also*, 53 *N. Y.*, 260); *Platt* agt. *White* (5 *Denio*, 271; 50 *Barb.*, 288; 70 *N. Y.*, 486). Section 5117 of the laws of the Revised Statutes of United States is as follows, viz.: "No debt created by * * * the bankrupt * * * while acting in any fiduciary character shall be discharged by proceedings in bankruptcy." It has been held that the meaning of the words "fiduciary capacity" having been ascertained and declared by judicial construction of the act 1841, is affixed to the term, and the fixed definition is carried into the new statute 1867 (104 *Mass.*, 245). It was held in *Johns* agt. *Russell* (11 *B. R.*, 478), that an auctioneer acts in a fiduciary capacity, or character, and his discharge does not relieve him from his liability for goods placed in his charge for sale (*See Cardin* agt. *Cardin*, 8 *Barb.*, 41, and *Hullibent* agt. *Carter*, 10 *N. B. R.*, 359, and 155 *Mass.*, 435; *Treadwell* agt. *Halloway*, 12 *N. B. R.*, 61, and 46 *California*, 547). The appellant's learned counsel cite *Hennequin et al.* agt. *Clews* (77 *N. Y.*, 427), and argues that it is an authority upholding a contrary doctrine. We do not so understand that case. The defendant had received certain securities as pledge, with no other rights with respect to them than such as that relation entitled him to—and had wrongfully hypothecated and sold them.

The court held that his discharge in bankruptcy operated upon the plaintiff's claim, and the defendant was not, after such a discharge, liable to an order of arrest.

Nor does the case of *Neal* agt. *Clark* (95 *U. S. R.*, 704), aid the appellant. The case simply holds that an executor who, without any positive, active, affirmative fraud, had committed a *devastavit*, was discharged in proceedings in bankruptcy.

Nor can the composition proceedings have any greater effect than would a discharge. If one would not cut off the debt, the other would not (*Libbey* agt. *Strasburger*, 14 *Hun*, 120; *Argall* agt. *Jacobs*, 21 *Hun*, 115). The second defense predi-

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cated upon a separate independent contract, was improperly stricken out (*Patterson* agt. *Richardson*, 22 *Barb.*, 145; *Bank* agt. *Monteith*, 39 *N. Y.*, 297; *Chambers* agt. *Lewis*, 11 *Abbott*, 110; *Allen* agt. *Patterson*, 3 *Seldon*, 476; 53 *N. Y.*, 307; 42 *N. Y.*, 83).

There was evidence upon which the jury were warranted in finding there was no authority to sell upon credit, and there was no proof of a custom to sell on credit shown to have been known to plaintiff (50 *Barb.*, 288). We see no other error in the course of trial calling for a reversal of the judgment.

Judgment reversed and a new trial ordered, with costs to abide the event, unless the plaintiff stipulates to reduce the verdict and judgment by deducting therefrom twenty dollars and interest from the 30th day of November, 1873, in which case the judgment as so modified is affirmed with costs.

TALCOTT, P. J., and SMITH, J., concur.

N. Y. SUPERIOR COURT.

WILLIAM W. DUSENBURY, administrator, agt. CHARLES D.
DUSENBURY.

WILLIAM W. DUSENBURY, administrator, agt. BENJAMIN
DUSENBURY.

*Motion for new trial upon judge's minutes—when not to be entertained—
Code of Civil Procedure, section 999.*

Section 999 of the Code does not authorize the trial judge to entertain a motion for a new trial on his minutes, in the case of the dismissal of the complaint on the plaintiff's own showing; the plaintiff's remedy being either by appeal or a motion for a new trial at special term on a case to be made and settled.

Special Term, August, 1881.

Dusenbury agt. Dusenbury.

MOTION by plaintiff in each of the above entitled actions upon the minutes of the judge, to set aside judgment, entered upon the order of nonsuit granted at the trial, and to grant a new trial upon exceptions.

Ira D. Warren, for plaintiff.

Hall & Blandy, for defendants.

FREEDMAN, *J.*—Although the point decided in *Tinson* agt. *Welch* (51 *N. Y.*, 244), in which case there was a verdict but no exception, has been obviated by the amendments made by section 999 of the Code of Civil Procedure, yet the general term of the supreme court, in *Van Doren* agt. *Horton* (19 *Hun*, 7), in construing that section, decided that an exception without a verdict is equally unavailing to authorize the trial judge to entertain a motion for a new trial on his minutes, and that an exception to a mere non-suit is not enough. The kind of motion which, by the language of that section, the judge is empowered to entertain upon his minutes, is a motion to set aside the verdict and grant a new trial. The verdict may have been directed by the trial judge or it may represent the independent judgment of the jury upon the facts. But in the case of a dismissal of the complaint upon the plaintiff's own showing, there is no verdict at all, though a jury may have been impaneled to try the issue. Whatever, therefore, my views may be as to the merits of the motion before me, the motion must be denied and the plaintiff left to seek his remedy either by a motion for a new trial at special term on a case to be made and settled, or by appeal to the general term, as he may be advised.

Reed agt. Loucks.

SUPREME COURT.

LUMAN REED and others agt. DENNIS LOUCKS.

Ejectment—New trial—The statute authorizing the vacating of the judgment and a new trial in ejectment, applies to ejectment for non-payment of rent—Relief against omissions “through mistake”—Code of Civil Procedure, section 724.

One A. L., then in possession of the property, on March 31, 1866, executed a mortgage to one K. to secure the payment of \$920 and interest advanced by K. to A. L. to purchase the same. K. brought a suit in 1875 to foreclose the mortgage. G. and M. who held a subsequent mortgage defended on the ground that A. L. held no title. On the trial K. succeeded, and the premises were sold and K. bought. D. L. occupied one year under him and paid rent. Then one H. entered under K. and is still in possession. K. has since paid a prior mortgage of \$700, so that he has put in the property over \$1,600. Pending the foreclosure in August, 1875, the present action was brought against D. L., who was then in possession, to recover property for non-payment of rent. D. L. did not defend, and on June 27, 1876, the plaintiffs obtained judgment; M., of the firm of G. & M., being his counsel. Of all this K. was ignorant, and in 1877 paid the prior mortgage of \$700. G. & M. having obtained the title of present plaintiffs, bring ejectment against H., K.'s tenant, claiming that the judgment in this suit cuts off K.'s rights:

Held, that justice requires that the judgment in this action should be opened.

Held, also, that the motion can be granted under section 724 of the Code of Civil Procedure, as evidently there was a mistake, and no written notice of the judgment was given.

Held, further, that by the Revised Statutes (vol. 3, page 576, section 34, 6th edition) the court has power in “every judgment in ejectment rendered by default, on payment of costs, &c., &c., to vacate such judgment, and grant a new trial if such court shall be satisfied that justice will be promoted,” &c., &c. Every judgment in ejectment rendered by default certainly includes one brought to recover for non-payment of rent (*Christie agt. Bloomingdale*, 18 *How.*, 12, not approved).

Ulster Special Term, June, 1879.

Reed agt. Loucks.

MOTION by Robert Kerr, the landlord of defendant Loucks, to set aside a judgment by default in an action of ejectment recovered against the tenant.

G. R. Adams, for motion.

I. H. Maynard, for plaintiffs and opposed.

WESTBROOK, *J.* — One Abraham Loucks, then in possession of the property, on March 31, 1866, executed a mortgage to one Robert Kerr to secure the payment of \$920 and interest. This mortgage was given to secure that sum advanced by Kerr to Loucks to purchase the same. Kerr brought a suit in March, 1875, to foreclose the mortgage. Gilbert & Maynard, who held a subsequent mortgage on the same property, defended on the ground that Abraham Loucks held no title. On a trial Kerr succeeded, and the premises were sold under a decree of foreclosure on November 3, 1876, and Kerr bought Dennis Loucks occupied one year under him and paid rent. Then Marcy Hallenbeck entered under Kerr and is still in possession. Kerr has since paid a prior mortgage of \$700, so that Kerr has put in the property over \$1,600.

Pending the foreclosure, and in August, 1875, the present action was brought against Dennis Loucks, who was then in possession, to recover the property for non-payment of rent. Dennis did not defend, and on June 27, 1876, the plaintiffs obtained judgment, Isaac H. Maynard, of Gilbert & Maynard, being his counsel. Of all this Kerr was ignorant, and in 1877, paid the prior mortgage of \$700. Gilbert & Maynard having obtained the title of the present plaintiffs, bring ejectment against Hallenbeck, Kerr's tenant, claiming that the judgment in this suit cuts off Kerr's rights. Very plainly, if the new suit can thus be sustained, great injustice will be done to Kerr.

Justice requires that the judgment in this action should be opened. That places all parties where they should be. If this action can be maintained, the plaintiffs will succeed and get their rights. The motion can be granted under section

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724 of the Code, as evidently there was a mistake, and no written notice of the judgment was given (*Bissell* agt. *N. Y. Cent. R. R. Co.*, 66 *Barb.*, 386; see pages 390, 391). There need, however, be no difficulty on this point, for independent thereof, by the Revised Statutes (*vol. 3, page 576, section 34, 6 edition*), the court has power in "every judgment in ejectment rendered by default on payment of costs, &c., to vacate such judgment, and grant a new trial if such court shall be satisfied that justice will be promoted," &c., &c. I am so satisfied, and for that reason grant a new trial on payment of the costs and damages. Kerr should also be made a party and allowed to defend.

Christie agt. *Bloomington* (18 *How.*, 12), was not a judgment "on default," and with the remarks of judge GOULD (*on pages 13 and 14*), I do not agree. "Every judgment in ejectment rendered by default," certainly includes one brought to recover premises for non-payment of rent, and I never hold to a construction of a statute nullifying plain words, expressive of a clear intent, and certainly this case well illustrates the need of interpreting the statute as it reads. As the statute provides for a new trial in "every judgment in ejectment rendered by default," it was necessary, if it was intended to apply only to a case in which damages had been recovered, so to declare in plain words; but, as it reads, its application is not limited to a case, in which damages can be given. And if the reasoning of the opinion, in the decision referred to, upon the statute giving the right of redemption (3 *R. S.* [6th edition], page 819, section 5) is sound, then an irregular judgment and execution would, after the lapse of six months, create a bar, a purpose and intent which could not have been entertained. The bar created by the statute is based upon a judgment and execution which are upheld, and not vacated and set aside. Thus reading the statutes, there is no confusion.

The relief granted is based upon both section 724 of the Code and the provisions of the Revised Statutes in regard to

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new trials in ejectment cases. The defendant in the action seems to have been ignorant of the nature of the proceedings against him, whilst Kerr, the party who is to suffer, was entirely in ignorance of the proceeding. Loucks labored under "a mistake" of ignorance as to the effect of the suit, whilst Kerr labored under "a mistake" of ignorance of any suit, and the failure of either to move earlier was, I think, under the circumstances, excusable neglect. The year given by section 724 in which to move has not yet expired, for notice has not been given (67 *Barb.*, 386, *before cited*).

SUPREME COURT.

ROYER WHEEL COMPANY agt. ROBERT FIELDING *et al.*

Fraudulent conveyances—Execution upon judgment—When not necessary in creditor's action—Chap. 466, Laws of 1877—Misjoinder of cause of action—Pleading.

The defendants, who were partners and joint debtors and were insolvent, conveyed each his individual real estate, without actual consideration being paid, and then made a general assignment for the benefit of creditors:

Held, that though the assignment is valid, the conveyances are fraudulent and void, and cannot be upheld as made to provide for debts of the grantors, for a want of conformity to the provisions of chapter 466 of the Laws of 1877, which apply to "conveyances," as well as "assignments," made by a debtor.

Also, that to establish the judgment creditor's lien on real estate no execution upon the judgment was necessary.

Also, that it was no misjoinder of causes of action, to unite in the complaint, causes for the joint fraud, with those of the individual fraud of the defendants.

Special Term, June, 1881.

William M. Powell, for plaintiff.

James K. Hill, for defendant.

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VAN VORST, *J.*—In the general assignment made by the judgment debtors, I discover no evidence of fraud; and as far as that instrument is concerned the plaintiff is not entitled to relief. The conveyances, however, made by the debtor, George Fielding, of his individual real estate on the 3d day of November, 1880, are fraudulent and void. The grantor was insolvent. The conveyances were made for the nominal consideration of one dollar. No actual consideration was paid. They conveyed away all the debtor's individual property. That he could not lawfully do for a nominal consideration.

If these conveyances are sought to be upheld as made to provide for debts of the grantor, they are void for a want of conformity to the provisions of chapter 466 of the Laws of 1877. The provision of that chapter applies to "conveyances" as well as "assignments," made by a debtor, and it embraces provisions and safeguards, which have been wholly ignored. And the same remark applies to the conveyance made by Robert Fielding to Robert N. Fielding of the 15th of November, 1880. It is also void.

The objection in respect to the execution is not well taken. To establish the judgment creditor's lien on the real estate of the debtor, no execution was in fact necessary. That it has been issued and returned offers no reason why the conveyances should not be adjudged fraudulent as to the judgment.

Nor is the objection that there is a misjoinder of causes of action well taken. The defendants were partners and joint debtors, and seem to have been actuated by a common purpose with respect to the disposition of their property, joint and several.

It is true that the general assignment is upheld; but that does not validate the separate conveyances, which are void for the reasons above stated. Besides, this objection should have been taken by demurrer.

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U. S. DISTRICT COURT.

THOMAS McLAUGHLIN agt. THE ALBANY AND RENSSELAER
IRON AND STEEL COMPANY.

Bill of lading—Demurrage.

Where a bill of lading contains a clause that in case the consignees of a cargo shall discharge the same they shall charge the master not to exceed ten cents per ton, and have four full working days to discharge the same after notice of the arrival of the boat at their dock, and to pay the master for any time the boat is detained for discharging, after the expiration of said four days, five dollars per day, and at the same rate for portions of a day:

Held, that the consignees had an election, upon the arrival of the boat, whether they would themselves unload the cargo or require the master to unload it. Primarily it was the duty of the master to unload the cargo.

Where in such a case the consignees upon the arrival of the boat offered the master dock room, though without special facilities for speedy and economical unloading, and notified him that they would not unload the cargo except he would wait his regular turn, and would not pay him demurrage:

Held, that this was notice to the master that the consignees elected not to unload the cargo except in its regular turn, and that the master, after such notification, having seen fit to wait his turn was not entitled to recover demurrage.

Southern District of New York, July, 1881.

IN ADMIRALTY.—This was a libel for freight and demurrage growing out of the detention of the canal boats "O. K." and "Leon" laden with cargoes of coal consigned to the respondent. The amount claimed for freight was admitted, and the only question litigated was that in respect to demurrage. It appeared by the testimony that the respondent's dockmaster

NOTE.—The case of *Tuttle* against the same respondent, referred to in the foregoing opinion, was also a libel in admiralty in the district court of the United States for the southern district of New York, and the facts were substantially the same as in the above case, except that it appeared, among other things, that there was quite an accumulation of boats at the

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notified the masters of the boats on their arrival that dock-room would be furnished if they wanted to unload themselves, but that if the respondent unloaded them they would have to wait their regular turn, and that the respondent would not pay them demurrage however long they might be detained. It also appeared that a printed notice to the same effect was posted conspicuously at the scales on the respondent's dock. It also appeared that the masters refused to unload their own boats unless the respondent would pay them all it might cost them in excess of ten cents per ton. It was admitted that dock room was offered and that it was declined.

J. A. Hyland, proctor, for libellant.

Holbrook & Smith, proctors, for respondent, cited the following cases: *Western Transportation Co.* agt. *Hoyt* (69 *N. Y.*, 230); *Shaw* agt. *Republic Life Ins. Co.* (69 *id.*, 286);

respondent's dock ahead of the libelants waiting to be discharged, and that such accumulation was owing to a break in the canal.

Welcome R. Beebe, proctor, for libellant.

Holbrook & Smith, proctors, for respondent.

CHOATE, J. — This is a suit to recover demurrage for detaining the libellant's canal boat beyond the time allowed by the bill of lading for discharging her cargo of coal. The bill of lading which was dated September 8, 1875, acknowledged the shipment of the coal at Watkins, N. Y., "to be delivered addressed without delay in like good order as received, subject to the following conditions:" * * * "In case the consignee discharges the cargo, or any part thereof, he is to charge the master not to exceed twelve and a-half cents per ton for the same, and to have four full working days after due notice of the arrival of the boat at the dock of the consignee in which to discharge cargo, and to pay the master for any time (exclusive of Sundays and all legal holidays) the boat is detained by said consignee for discharging after the expiration of said three days at the rate of ten dollars per day. The master to furnish men to attend guy on boat while unloading." The consignee named was the defendant, "*The Albany and Rensselaer Iron and Steel Company, Troy.*" The boat arrived at defendant's dock in Troy, and the master reported his arrival to the defendant on the fifteenth day of September, at seven o'clock in the evening. The discharge of the cargo was commenced on

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Hurley agt. Brooklyn Ice Co. (14 *Blatch.*, 522); *The M. S. Bacon agt. Erie & W. Trans. Co.* (3 *Fed. Rep.*, 344); *Bjorkquist agt. Steel Rails* (3 *id.*, 717); *Gage agt. Morse* (12 *Allen*, 410); *Sprague agt. West* (*Abbott Ad.*, 548) *The Hyperion's cargo* (2 *Lowell*, 93).

BROWN, J. — All the claims in this case are agreed upon except as to claim for demurrage. This claim arises upon the following clause in the bill of lading: "In case consignee discharge cargo, or any part thereof, they are to be charged not to exceed ten cents per ton, and to have four full working days after notice of arrival at dock, of consignee of said boat, in which to discharge cargo, and to pay master for any time (exclusive of Sunday) boat is detained for discharging, after the expiration of the said four days, five dollars per day, and at the same rate for portions of days." The decision of this court in *Tuttle* against this defendant upon a bill of

the twenty-third of September and finished on the twenty-fourth, at four P. M. The cargo was discharged by the respondent's servants, and by the use of their derricks. There is some conflict of evidence as to what took place between the master and the defendant's agents on his arrival and reporting in respect to the discharge of his cargo. His testimony is that he was only told that he was to wait his turn to discharge, that after his discharge, when he received his freight money, he demanded his demurrage, which was refused, but that he was told that his taking his freight would make no difference about the demurrage. He signed a receipt in full of all demands. It is shown, I think, by the testimony of the employees of the company in connection with the receipt, that on his arrival he was assigned dock room where he was told he might discharge his cargo, and that he was also told that if he wished the company to discharge him he must wait his turn, and in that case that they would pay no demurrage, and that he declined to discharge himself and voluntarily waited his turn. And it is not proved that when he received his freight he claimed demurrage. It was shown that there were a large number of boats waiting to be discharged by the company. That the company had derricks arranged for discharging boats which they discharged; that there was plenty of dock room to discharge, but no derrick that was not in use by the company. The cause of the accumulation of boats at that time was that there had been a break in the canal. He now claims three days demurrage amounting to thirty

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lading, substantially identical with this (*see opinion of CHOATE, J., May 23, 1879*), is, I think, controlling in this case.

It was there held that upon such a bill of lading as this, the defendant had an election upon arrival of the boat, whether it would itself unload the coal or require the master to unload, as it was otherwise his duty to do.

On arrival the captain was, in this case, notified that the defendant would not unload the boat except in its regular turn, and in that case would pay no demurrage, and a berth was offered the captain where he could himself unload, if he did not accept that offer. The captain declined this offer unless he could have such additional facilities for unloading as defendant had at its own dock, or unless defendant would agree to pay the increase of cost over ten cents per ton. These things the captain had no legal right to ask for. He seems to have supposed that he had a right to be unloaded at ten cents per ton. The case above cited holds that it was, primarily, the captain's duty, under this bill of lading, to unload the cargo, and in offering him a berth, though without special facilities for speedy and economical unloading, the

dollars. The question turns on the proper construction of the bill of lading, and the effect on the rights of the libellant of what took place between him and the company in reference to the discharge of the cargo. The fair construction of the bill of lading is that if the company should elect to discharge the cargo instead of leaving the master to discharge himself, the demurrage should be paid. The bill of lading imposed on the master the obligation to discharge. It modified that obligation only so far as it gave the company the privilege of discharging if they saw fit to do so. What took place was not an election on their part to discharge the cargo except for the master and as an accommodation to him. The acts of the master in taking his freight money and receipting for all demands in full, seems to show that he so understood the agreement. The boat was not detained by the consignee, therefore, within the meaning of the contract, but by the master himself. At any rate it was competent for the parties to vary the contract as to demurrage, and it is evident from the testimony that the captain was contented to do so in the circumstances in which he found himself placed. From the evidence it is not unlikely that he concluded that the loss of two or three days was of less consequence to him than the greater trouble and expense involved

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defendant discharged all its legal duty upon the arrival of the boat. This offer of a berth is sworn to by the defendant's witnesses, and the captain of the boat distinctly admits such offer, and his refusal to unload except upon the terms stated. After this refusal the defendant was not required to make any further tender of a berth.

The defendant's notice to him was a rejection of their right of election to unload under the bill of lading, and the subsequent delay was by the captain's own choice and for his own convenience and economy. Rather than incur the increased expense of unloading without machinery or power, the captain chose to await his turn and enjoy the advantages of defendant's special facilities for unloading. After the notice given him he had no right to wait and take advantage of defendant's improved facilities, at their expense, nor avail himself of their facilities except upon the terms expressly stated to him, viz.: that no demurrage should be paid. His claim that he would charge for demurrage, which the defendants told him would not be paid, could not impose upon the defendant any liability which they were not already under. The final unloading

in discharging his cargo without being able to use the facilities which the company had for doing the work.

Libel dismissed with costs.

The case of *Thorne agt. Henry Burden & Sons*, decided at the general term of the supreme court of this state for the fourth department, not reported, is also in point and was cited by the respondent in the foregoing cases. The action was brought to recover freight and demurrage. It was conceded that the defendants were liable for the balance of freight, but denied that they were liable for demurrage. The facts relating to the question of demurrage were as follows:

The plaintiff was employed by the Morris Run Coal Company to transport a boat-load of coal from Watkins, N. Y., to the defendants at Troy. The defendants had derricks upon their dock with which they were accustomed to unload coal upon its arrival. It was voluntary on their part whether they did so or not, but when they did so they unloaded boats in the order of their arrival, and charged for unloading. Upon the arrival of the plaintiff's boat at defendants' dock there were several other boats there loaded with coal which had arrived previous to the plaintiff's, and some of them were then unloading. The plaintiff's captain reported him-

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of the boat by the defendant in their turn, cannot be construed as done under the election contained in the bill of lading; but as a subsequent favor to the captain, independent of the bill of lading, and imposing no liability under it.

The libelant should have judgment for the amount tendered and deposited in court (*i. e.*, the freight money), with costs, prior to the tender to the libelant, and with costs since the tender, to the respondent.

self to the defendants and requested to be unloaded, and was told by them that if they unloaded him he must "wait until the boats in advance of him were discharged." There was ample unoccupied dock room at said dock where plaintiff might have discharged, and the captain was informed that he might discharge his cargo himself or wait his turn at the derricks and be unloaded by the defendants. He chose the latter course and waited several days until his turn came, and was then discharged by the defendants. He then claimed demurrage for this delay. The action was tried before a referee, who reported in favor of the plaintiff. The defendants appealed to the general term. The opinion at general term was delivered by MULLIN, J., and upon the question of demurrage is as follows:

* * * "The defendants did not prevent the plaintiff from unloading his cargo, and they were not liable for demurrage or damages in the nature of demurrage. When the plaintiff elected to have defendants unload the boat he elected to have it done according to the usual course of business, which was to unload boats in the order of arrival, and it is proved that plaintiff's boat was so unloaded."

The claim for demurrage was accordingly disallowed.

People *ex rel.* Lopardo agt. Catholic Protectory.

SUPREME COURT.

PEOPLE *ex rel.* LOPARDO agt. CATHOLIC PROTECTORY.

Catholic Protectory — Vagrant children — Commitment under act of 1877, may be made without notice to parents.

Children found picking rags in the streets of the city of New York may be committed to the Catholic Protectory under the act of 1877 (*Laws of 1877, chapter 428*), without notice to parents or guardians.

Special Term, August, 1881.

CULLEN, J. — In this and three other cases the relators seek their discharge from the protectory, to which they were committed for picking rags. The same point is involved in all the cases. It is claimed that the detention is unlawful because the provisions of sections 10 to 14 of chapter 448, Laws of 1863 (the act incorporating the protectory), as to service of notice of such committal on the parents or guardians of the children committed, have not been complied with. If the relators were committed under the act of 1863 the point might be good. By that act, which was at the time the only authority for committing to the protectory, children coming within the terms of section 18 of the act of January 23, 1833, might be committed to the protectory instead of the almshouse, and provision was made for notice thereof being given to the parents. But by chapter 428, Laws of 1877, magistrates and courts are authorized to commit children coming within certain descriptions named in the act either to an orphan asylum, charitable or other institution, or may dispose of them as is provided by law in the case of truant, vagrant or disorderly children. By chapter 496, Laws of 1881, the act of 1877 is amended so as to include within its description of children subject to the act, such as may be found picking rags. These relators therefore, on conviction by the magistrate, were subject to two dispositions: First. Their commitment to orphan asylums and charitable institutions.

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Second. To be treated as vagrant children. It is conceded that the respondent is such an institution as to which children might properly be sent. No provision for notice to parents is found in the act of 1877, and I think, therefore, when the commitment is made to the protectory, under the act of 1877, notice to parents is unnecessary. This would plainly be the case had the relators been sent to any other institution, and I do not think the restrictions or provisions of the act of 1863, which, in terms, applied only to certain commitments to the protectory, can affect or limit the provisions of the act of 1877.

Writs dismissed ; relators remanded.

N. Y. COMMON PLEAS.

WILLIAM McINERES agt. JOHN HOGAN.

*Agreement to lease—Specific performance—action to compel execution of—
Part performance—Proof required to entitle party to a decree of specific
performance.*

Where plaintiff sues to compel defendant to execute and deliver a lease of certain premises in the city of New York, for the period of four years, from May 18, 1881, upon the ground of part performance of an agreement to lease, and defendant claims that the plaintiff was in possession under an oral lease for one year:

Held, that the rule being that the contract must be established by competent proofs, and be clear, definite and certain, the preponderance, with the conflict of evidence, is with the defendant; and, therefore, the possession of the plaintiff, as it may have been taken under a letting for a year, cannot be held to be a part performance of the contract alleged by him; nor could the improvements upon the premises be a part performance, as they were not made in pursuance of any provision of the agreement.

Equity Term, June, 1881.

Lindsay & Flammer and Gratz Nathan, for plaintiff.

Chauncey S. Truax, for defendant.

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BEACH, J. — It seems to me now, as it did upon the trial, that the controlling questions in this case arise from the wide divergence between the witnesses for the respective parties. Upon behalf of the plaintiff the evidence tends to establish the letting to have been for four years and two months, and for the defendant, that it was for fourteen months. Upon a review of the proofs, I am of the opinion that the preponderance is with the defendant. The plaintiff has not proved the agreement alleged by him with the certainty required by a court of equity. The rule is, that the contract must be established by competent proofs, and be clear, definite and certain (1 *Story's Eq. Juris.*, sec. 764; *Lobdell* agt. *Lobdell*, 36 *N. Y. R.*, 327; *Parkhurst* agt. *Van Cortlandt*, 1 *Johns. Ch.*, 273).

With the conflict of evidence it would be difficult to hold the possession of the plaintiff a part performance of the contract alleged by him, because it may as well have been taken under the one urged by the defendant (*Phillips* agt. *Thompson*, 1 *Johns. Ch.*, 131). Neither could the improvements upon the premises be a part performance, as they were not made in pursuance of any provision of the agreement. In *Wright* agt. *Packet* (22 *Grattan*, 374), the requisites to a decree on this ground are thus enumerated: First. The parol agreement relied on must be certain and definite in its terms. Second. The act proved in part performance must refer to, result from, or be made in pursuance of, the agreement proved. Third. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation.

In conclusion, I am of opinion that the plaintiff must fail, the weight of evidence being with the defendant as to the terms of the contract.

Decree for the defendant, with costs.

Grotz agt. Hussey.

N. Y. COMMON PLEAS.

FREDERICK GROTZ, respondent, agt. GEORGE HUSSEY and another, appellant.

Replevin proceedings in district courts — Undertaking must be approved by the justice.

In replevin proceedings in the district courts the undertaking, on the part of the plaintiff, must be approved by the justice, and not by the marshal.

General Term, May, 1881.

Before DALY, C. J., VAN BRUNT and J. F. DALY, JJ.

ON the 8th of February, 1881, a summons was issued by the clerk of the seventh district court in this action, returnable on the 15th of February, 1881, requiring the defendant to answer the complaint of the plaintiff in this action, and a notice that the plaintiff would take judgment against the defendant for the sum of \$150, if the defendant then failed to appear and answer. At the same time an affidavit for the claim and delivery of personal property therein mentioned was made and submitted to the justice, who signed the following requisition :

“To the marshal of the city of New York, to whom the summons in this action is delivered : I hereby require you to replevy the property described in the within affidavit, on or before the 15th day of February, 1881, at least six days before the return day of the summons. Dated New York, February 8, 1881.”

At the same time was delivered to the marshal an undertaking upon the part of the plaintiff, and the marshal indorsed his approval of the written undertaking as to its form and sufficiency. Upon the return day of the summons the defendant Hussey appeared by his attorney, and before interposing an answer in the case made a motion to dismiss the replevin

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proceedings upon two grounds: First, because the proper indorsement was not made upon the affidavit; and, second, that the undertaking should have been approved by the justice and not by the marshal. This motion was denied and the defendant excepted. The plaintiff thereupon made an oral complaint of the unlawful taking and conversion of personal property, and defendant answered by a general denial; and the issues thus raised were tried and resulted in a judgment in favor of the plaintiff against the defendant Hussey "for the possession of the property claimed in this action, or in case the possession or receiving possession cannot be had, then and in such case the plaintiff have judgment for the value of such property, which is hereby assessed at the sum of \$100. From this judgment the defendant appeals to the general term of this court.

Henry Steinert, for plaintiff.

D. M. Porter, for defendant.

VAN BRUNT, *J.*—The condition of the statutes regulating replevin proceedings, both in district courts and courts of record, is somewhat anomalous. By section 17, chapter 484 of the Laws of 1862, sections 206 to 217, inclusive, of the Code of Procedure were made to apply to the district courts in the city of New York; these sections of the Code of Procedure regulating the course of replevin proceedings in courts of record. By the repealing act of 1877, chapter 417, passed at the time of the adoption of the new Code of Procedure, the above sections of the old Code are expressly excluded from the repealing act, and we do not find that by the repealing act of 1880, chapter 245, they have been affected.

Although these sections remained in full force and effect, apparently, the new Code of Civil Procedure has adopted a complete system of procedure in actions to recover possession of personal property, and it is provided what shall be the

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course of such procedure in the district courts. By section 3210, articles 3, 4 and 5 of title 2 of chapter 19 of this act was made to apply to actions brought in a district court of the city of New York. Article 5 of said title provides what the requisition shall be, and prescribes the form of the affidavit and undertaking, which shall be in all respects similar to the affidavit and undertaking required to be delivered to the sheriff as prescribed by the Code, except that the sureties upon the undertaking must be approved by the justice. The sureties in the case at bar, having been approved by the marshal, no undertaking was given and approved as required by the Code, so as to confer any jurisdiction upon the marshal to execute the proceedings.

The justice erred, therefore, in not dismissing the proceedings when this objection was taken.

It is urged upon the part of the plaintiff and respondent that even if the proceedings in replevin had been dismissed, a summons having been served, the action might still have proceeded. It is sufficient answer to this objection to say that the only way in which any error in the ruling of the justice as to the regularity of any preliminary proceedings can be reviewed, is upon an appeal from the judgment, and that such exceptions form necessarily a part of the return.

It might be further said that the judgment pronounced by the justice was predicated upon these proceedings. If those proceedings did not exist, a judgment *in rem* could not have been pronounced, as was pronounced by the justice.

The order of the justice in sustaining the proceedings therein, pervades the judgment itself, which was rendered upon the trial of the issues raised by the pleadings.

The ruling of the justice having been erroneous in regard to these proceedings, the judgment must be reversed.

Goodale agt. Brocknor *et al.*

SUPREME COURT.

JOHN H. GOODALE, as superintendent of the poor of Orange county, agt. WASHINGTON BROCKNOR *et al.*, as executors, &c., of ABRAHAM MAZE, deceased.

Husband and wife—Liability of husband for necessities furnished his wife who leaves him while insane—Superintendent of the poor cannot maintain action for.

Though a husband, whose wife leaves him while insane, would have been liable at common law to any one who should have supplied her with necessities, or maintained her, yet an action on such common law liability cannot be maintained by a superintendent of the poor.

At Circuit, August, 1881.

THIS action was tried before Mr. justice CULLEN and a jury at Newburgh, on the eleventh day of last April, and the court directed the jury to find a verdict in favor of the plaintiff, upon the plaintiff's counsel stipulating "that if the court, on motion of defendants for a new trial, is of opinion that the court should have nonsuited or directed a judgment in defendant's favor, the court may order such judgment in defendant's favor, a new trial not to be had." A motion for a new trial was made on the twenty-third of April, and has just been decided in favor of the defendants. The facts sufficiently appear in the opinion.

Wadsworth, Murray & Cuddeback, for plaintiff.

Edward F. Brown, for defendants.

CULLEN, J. — I think that, upon the facts proved upon the trial and conceded by the defendants, the defendants' testator was in default as to his conduct toward his wife, and would have been liable at common law to any one who should have

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supplied her with necessities or maintained her. The wife being insane when she left her husband, such an act on her part was not a desertion of him, and the husband was bound to have taken care of her. The amount expended for her support by the plaintiff is conceded to be correct and to have been properly applied. But, as I understand the decision, the case of *Norton agt. Rhodes* (18 *Barbour*, 100) holds that an action on such common law liability cannot be maintained by a superintendent of the poor against a husband. The case is exactly in point, and as it has not been criticised or overruled I feel bound by its authority.

Verdict set aside and judgment ordered for defendants on stipulation.

SUPREME COURT.

THE PEOPLE *ex rel.* RICHARDSON H. THURMAN agt. JAMES RYAN, JR., EDWARD MCGLYNN and TIMOTHY RYAN, general assessors of Troy, and JOHN P. ALBERTSON, comptroller of Troy.

Taxation—Party can only be assessed for his “taxable personal property,” deducting from its value the just debts owing by him—What are just debts.

The relator was the owner of 221 shares of the capital stock of the First National Bank of Troy, which the assessors, in the imposition of a tax upon him, have valued at sixty-five dollars and fifty-three cents per share. On the 1st day of September, 1880, the relator appeared before the assessors and was sworn and examined orally as to his property. The evidence disclosed debts owing by the relator greater than the value of his personal property, including as a part of such personal property his shares of stock in the bank. Twenty-five thousand dollars of the debt owing by him was for money borrowed of the First National Bank of New York, for which amount such bank held his note, payable on demand. The note had been discounted in May or June, 1880, and with its proceeds such bank had purchased for the relator United States bonds, which it held as collateral security for the payment of the note. The assessors refused to deduct the amount of such note from

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the taxable property. On *certiorari*, under chapter 269 of the Laws of 1880, to review the assessment:

Held, that the assessors were not justified in their refusal to deduct the debt owing by the relator in New York from the value of his bank shares.

The obligation held by the New York bank against the relator was a just debt, as it was for money loaned to him, for which he had given his promissory note, payable on demand. That such money had been used to purchase United States bonds, which were pledged to the bank as security for the payment of the note, did not make it less than a just debt, which must, by the Revised Statutes, be deducted from the value of the relator's "taxable personal property," and by the act of 1880 (*chapter 596*), from the value of his bank shares, and for the balance only of such value was the relator taxable.

Albany Special Term, July, 1881.

CERTIORARI under chapter 269 of the Laws of 1880 to review an assessment.

Samuel Foster, for relator.

R. A. Parmenter, for respondent.

WESTBROOK, J.—The return to the writ of *certiorari* discloses the following facts: The relator, Richardson H. Thurman, is a resident of the city of Troy, and is cashier of a banking institution there located, and named "The First National Bank of Troy." The capital stock of such bank is \$300,000, divided into 3,000 shares of \$100 each, and it has also a surplus of undivided profits over and above its capital stock. The relator is the owner of 221 shares of the capital stock of such bank, which the assessors, in the imposition of a tax upon him, have valued at sixty-five dollars and fifty-three cents per share, over and above the value of the real estate owned by the bank.

By affidavit duly made and served upon the assessors, the relator claimed that he was not taxable for any personal property whatever, because after deducting all just debts, and all

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personal property exempt from taxation, the value of his personal property did not exceed one dollar.

On the 1st day of September, 1880, the said Thurman appeared before the assessors and was there sworn and examined orally as to his property. Without repeating the details of the evidence, it is sufficient to say that it disclosed debts owing by the relator greater than the value of his taxable personal property, including as a part of such personal property his shares of stock in the bank. Twenty-five thousand dollars of the debt owing by him was for money borrowed of the First National Bank of New York, for which amount such bank held his note payable on demand. The note had been discounted in May or June, 1880, and with its proceeds such bank had purchased for the relator United States bonds, which it held as collateral security for the payment of the note. The assessors refused to deduct the amount of such note from the taxable property upon the ground, apparently, that the money owing to the New York bank could not be treated as a debt, because it was used to purchase Government bonds to escape taxation.

It should be added that the evidence given by the relator was entirely uncontradicted, and he denied that he had purchased such bonds, and contracted such debt for the purpose of escaping taxation. All these facts appear by the return, and consequently (*chap. 269 of Laws of 1880, sec. 4*) there is no necessity of taking evidence as the act, under which this proceeding is brought, permits.

The question, laying aside all side issues, is, were the assessors justified in their refusal to deduct the debt owing by the relator in New York from the value of his bank shares?

The Revised Statutes of this state (*vol. 1 of 6th ed., p. 936, subd. 4 of sec. 9*) direct, that in taxing an individual for personal property there shall be placed in the assessment roll, "in the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him."

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The act of 1880 (*chap.* 596, *sec.* 3) provides that in taxing bank shares, "each stockholder shall be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable property, owned by individual citizens of this state, and the assessment or taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state."

With these provisions of our statutes before them, there was but one course for the assessors to pursue. The relator could only be assessed for his "taxable personal property," deducting from its value "the just debts owing by him." The obligation held by the New York bank against the relator was a just debt, as it was for money loaned to him, for which he had given his promissory note payable on demand. That such money had been used to purchase United States bonds, which were pledged to the bank as security for the payment of the note did not make it less than a just debt. It is true that if the bonds were converted into cash the proceeds would extinguish the debt, and then, to use the language of the respondent's counsel, "one hand would wash the other," but such sale has not been made, the money due to the bank has not been paid, and it is beyond all peradventure a just debt, which must, by the Revised Statutes, be deducted from the value of the relator's "taxable personal property," and by the act of 1880 (*chap.* 596), from the value of his bank shares, and for the balance only of such value was the relator taxable. The statutes, to authorize the action of the assessors, should provide for the deduction of debts from all the personal property of the individual taxed, which they do not do, but compel such deduction to be made from the "taxable personal property" of such person. The assessors have in fact made one gross sum of all the personal property — taxable and non-taxable — and from such gross sum have deducted the debts. This may be just, but it is not the law, and until that is changed there is but one course to pursue, and that is to follow the statute.

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The assessors had no right arbitrarily to refuse to believe the evidence of the relator (*The People* agt. *Reddy*, 43 *Barbour*, 539), nor to decline to make the deduction, even though it was a device to avoid taxation (*Stillwell* agt. *Corwin*, 55 *Indiana*, 433). The relator had a right to purchase United States bonds, and to contract a debt for that purpose, and until our statutes are changed he had a right to insist that the debt he owed for such bonds should, when he was to be taxed for personal property, be deducted, to use the language of the statute, from his "taxable personal property," and not from all of his personal property.

The assessment upon the bank shares should be reversed, but no costs are awarded against the assessors, because it does not "appear to the court that they acted with gross negligence, in bad faith, or with malice," which must appear (*chap.* 269, *Laws of 1880*, *sec.* 6) to justify their imposition.

NOTE.—This case has been affirmed at the third department general term, September, 1881. [ED.]

SUPREME COURT.

THE EXCELSIOR GRAIN BINDING COMPANY, LIMITED, appellant,
agt. GEORGE H. STAYNER, respondent.

Stock—Subscription and payment both necessary to make a complete contract on which action may be maintained—The execution and delivery of check not payment.

The defendant subscribed for 100 shares of the capital stock of the plaintiff of the par value of fifty dollars each, and gave his check for ten per cent of the amount of the subscription; but before the check was presented for payment it was countermanded by the defendant:

Held (in action to recover the amount of defendant's subscription), that no binding subscription was made by defendant for the stock of the company, because of his failure to make the cash payment of ten per cent required by the statute before the subscription itself could be received by the commissioners; and what was done was entirely ineffectual (*Affirming S. C.*, 58 *How.*, 273).

First Department, General Term, July, 1881.

Before BRADY and DANIELS, JJ.

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APPEAL from a judgment recovered on trial before the court without a jury.

Robert Ludlow Fowler, for appellant.

D. M. Porter, for respondent.

DANIELS, *J.* — This action was prosecuted for the recovery of the sum of \$5,000, being the amount of the defendant's subscription for 100 shares of the capital stock of the plaintiff. These shares were of the par value of fifty dollars each, and the subscription by which the defendant agreed to take them was made before the company was completely organized. The company was incorporated under the authority of chapter 611 of the Laws of 1875. The certificate required for that purpose was filed, and the persons making it were empowered to open books for subscriptions to the capital stock, as that has been provided for by section 4 of this act. And the subscription made by the defendant was taken in the course of the proceedings for that purpose so authorized. But neither at the time when the subscription was made, nor at any time after that, did he pay to the commissioners any part of the amount for which the stock was afterwards to be issued to him. All that was done was to subscribe for the stock and deliver his check for ten per cent of the amount of the subscription. After the company was organized the board of directors declared the subscriptions to the capital stock to be due and payable, and because of a failure to pay on the part of the defendant this action was brought against him for the recovery of the amount. It was resisted chiefly because of the omission of the defendant to make the payment which the statute has required for the purpose of constituting a complete subscription to the stock of such a corporation. The provision of the act upon this subject is, that the commissioners shall proceed to open books for subscriptions to the capital stock of such corporations, but no subscription shall be received, unless at the time of making it the person so subscribing shall

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pay to said commissioners ten per cent of the par value of the stock subscribed for in cash (*Laws* 1875, p. 756, sec. 5).

The court at the trial held that this requirement had not been observed; that the execution and delivery of the subscriber's check for the ten per cent was not a payment of the amount of it in cash, and for that reason the subscription was ineffectual, and he never became liable upon it. Before the check was presented for payment it was countermanded by the defendant, and nothing, in fact, was ever received, either by the commissioners or the company itself, on this subscription. The provision contained in this act declaring how the payment shall be made for the purpose of completing the subscription is practically the same as that contained in the statute relating to the formation of limited partnerships. There the contribution made to the capital by the special partner is required to be paid in cash; and in the case of *Durant* agt. *Abendroth* (69 *N. Y.*, 148) it was held that a delivery of a check was not a compliance with what the law required to be done for the purpose of forming such a partnership. And as the act under which the plaintiff was incorporated has been enacted upon this subject in terms practically identical in their effect, this decision must be accepted as controlling in this case.

A different view of the effect of a check seems to have been taken in the case of *Thorpe* agt. *Woodhull* (1 *Sand. Ch. Rep.*, 411), but as this authority is subordinate to that pronouncing the judgment in the preceding case, it cannot properly be followed in the determination of this appeal. As the language employed in the enactment of this statute has been construed, it can be satisfied only by a payment in cash or its actual equivalent. The object of the law in making this requirement was to prevent the organization of corporations upon mere paper capital, and the security of persons dealing with them requires that such organization should not be permitted. If a check could be received as a compliance with what the law has required on this subject from one person, it

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could be from all; and the consequences of such a construction would be that a corporation might be organized without receiving a single cent of actual capital. That would induce the existence of fraudulent corporations, which it must have been the object of the legislature by means of this provision to prevent. It is a wholesome and proper restraint, and should be observed and enforced according to the fair import of the terms by which it has been created. In no proper sense of those terms can the unpaid or uncertified check of the subscriber be accepted or regarded as cash. And for that reason the provision contained in this statute was not complied with at the time when the defendant's subscription was made. A similar provision is contained in the general railroad laws of the state (2 *R. S.* [5th ed.], 669, *sec.* 4). And in the case of *Beach* agt. *Smith* (28 *Barb.*, 254), it was intimated that the ten per cent required to be paid at the time of the subscription might be received in a check or sight draft. But whether it could or not, was a point not presented by the case for the determination of the court, and for that reason what was said upon this subject cannot be accepted as authority. In that case, as well as the case of the *Ogdensburg R. R. Co.* agt. *Davis*, mentioned in the opinion, the amount required to render the subscription valid was in point of fact finally and actually paid, and, while this was not a formal compliance with what the statute had required, it was substantially so, and the transactions were sustained because the payments had actually been made in fact. This was the view which was taken in the further consideration of the case of *Beach* agt. *Smith*, in the court of appeals (30 *N. Y.*, 116), and for that reason the judgment of the supreme court was there affirmed. No binding authority has been found, allowing the payment required by the statute on such a subscription to be dispensed with. It must be made either in cash or its equivalent actually passing into the hands of the commissioners. Neither was done in this case, and therefore what the statute has declared to be necessary was not in this instance observed.

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Because of this failure no lawful subscription was made by the defendant for the stock of this corporation. The terms of the statute are clear and explicit that no subscription shall be received by the commissioners unless at the time of making it the person so subscribing shall pay to them ten per cent of the par value of the stock subscribed for, in cash. This was a clear prohibition, which they had no power to evade. They could receive the subscription in no other manner, and if the payment in cash was not made they were prohibited from permitting the party to become a subscriber. The language used upon this subject is so clear as to be incapable of misunderstanding. It was the intention of the legislature by means of it to render the requisite payment an indispensable condition to the validity of the subscription. If that should not be made, they could not allow the person proposing to take the stock to become a subscriber for it, and if they did so in contravention of the clear restraint of the statute, the subscriber could acquire no right to the stock, neither could the commissioners or the corporation enforce the formal terms of a contract made for the payment of its price. The principle is a general one that a contract which is repugnant to or contravenes the terms of a statute of the state is unlawful and cannot be enforced (*Burton agt. Port Jackson, &c., Plank Road Co.*, 17 Barb., 397; *Seneca Co. Bank agt. Lamb*, 26 Barb., 595-601).

A provision of a somewhat similar nature, though not as restricted in its expression as this, was considered in the case of the *Union Turnpike Road agt. Jenkins* (1 Caine, 381), and it was there held by the supreme court, the chief justice dissenting, that the failure to pay the per centage required upon the subscription would not prevent the maintenance of an action afterwards for its recovery. But this case was taken to the court of errors, and the decision made in it was reversed, because of the omission to pay the amount required to be received by the commissioners at the time when the subscription for the stock was made (*Caine's Cases in Error*, 86), and

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the doctrine of this case appears to have met the approval of the court afterwards, deciding those of *The President, &c.*, agt. *Hintin* (9 *John.*, 217), and *The President, &c.*, agt. *McKean* (11 *id.*, 98). In *Rensselaer, &c., Co.* agt. *Barton*, reported in a note to the case of *Lake Ontario, &c., R. R. Co.* agt. *Mason* (16 *N. Y.*, 451, 457), the correctness of these decisions was drawn in question, but they were neither overruled nor substantially impaired as authority. In the principal case to which the note has been appended, the validity of such a subscription was not presented for decision, for it did not depend upon the similar provision made upon this subject by section 4 of the act providing for the incorporation of railroad companies. The subscription forming the subject of that controversy was made under a preceding section of the act, and it was so held, which did not render it in terms dependent upon an accompanying payment of any amount in cash. After these two decisions were made, the validity of a stock subscription, under section 4 of the act providing for the formation of railroad corporations, was further considered by the court of appeals (*Black River, &c., Co.* agt. *Clarke*, 25 *N. Y.*, 208). The language then construed was in its effect similar to that employed in the act under the authority of which the subscription of the defendant was taken, and in the reference made to it, in the opinion of the court, it was said "that the intent of this section doubtless was, that no subscription should be valid until ten per cent was paid thereon, and not that it should be invalid if a short interval occur between the actual subscription and the payment of the money. The subscription and the payment of the ten per cent must both concur to make a valid subscription. The subscription one day, with payment the next, would satisfy the statute, and so would actual payment, at any period after subscription, with intent to effectuate and complete the subscription. The writing of the name in the subscription book should be deemed but part of the transaction and provisional or conditional till the ten per cent is paid (*Id.* 210). A simi-

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lar view was expressed in one of the opinions delivered in *Beach* agt. *Smith* (*supra*). It was there stated "that the statute under which the subscription in question is made, not only requires ten per cent to be paid, but it forbids the subscription to be received without such payment. It seems to me that a subscription taken in violation of this provision is not binding." These authorities plainly sanction the conclusion reached by the court of errors in the case of *The Union Turnpike Company* agt. *Jenkins*, and that has been further very materially fortified by a similar decision in the state of Pennsylvania (*Hibernia Turnpike Co.* agt. *Henderson*, 3 *Serg. & Rawle*, 219). The act in that case required a payment of five per cent upon the price of the stock to render the subscription a compliance with its provisions, and because of a failure to pay the amount the subscription itself was held to be void. A different conclusion was reached in *Henry* agt. *Vermillion, &c., Railroad Company* (17 *Ohio*, 187). That was a creditor's suit to enforce the payment of a subscription for the stock of the company, and in deciding it this point received no extended consideration, either upon principle or authority, but it was disposed of as a subject meriting very little attention in the case. The same observations are applicable to a like decision in the case of *Vicksburgh, &c., Railroad Company* agt. *McKean* (12 *Louisiana Ann.*, 638). And for these reasons these cases should not be allowed to exercise any controlling authority over the disposition of the present controversy. The cases of *McFarlan* agt. *Triton Insurance Company* (4 *Denio*, 392) and *Booth* agt. *Cleveland, &c., Company* (74 *N. Y.*, 15) have no direct or necessary application to the point in controversy, and need not, therefore, be specially considered. The authorities having a material bearing upon this point are so well sustained by the terms and theory of the statute itself as to require them to be followed, although in doing so the cases cited from the reports of other states are required to be disregarded. As the statute must be construed, no binding subscription was made by the

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defendant for the stock of the company, because of his failure to make the payment mentioned in the statute before the subscription itself could be received by the commissioners. What was done was entirely ineffectual, and for that reason it was properly held at the trial that the action could not be maintained.

The judgment, for the reasons already assigned, should therefore be affirmed, with costs.

BRADY, J., concurs.

SUPREME COURT.

JOHN EDWARDS, appellant, agt. THE CITY OF WATERTOWN,
respondent.

Municipal corporations—Delegation of powers or trusts—Distinction between acts quasi judicial and those which are merely ministerial—Ratification—Estoppel.

Public powers or trusts devolved by law upon the governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.

But there is a distinction between acts *quasi* judicial or involving discretion, and those which are merely ministerial.

Where in an action brought to recover for work and labor performed, materials furnished and money paid out for the defendant, a municipal corporation, in fitting up certain rooms leased by the defendant, and furnishing them with fixtures and furniture for the use of the defendant's officers, it was found by the referee that, at a regular meeting of the common council, it was resolved to take a lease of the rooms in question for five years, with a privilege of ten years if desired at a rent of \$400 per year; and at the same meeting the mayor of the city, as the presiding officer of the common council, appointed a committee consisting of three members of the common council and the recorder of the city to arrange the rooms and procure the necessary furniture, the action of the mayor being approved by the common council. That said committee, after their appointment, met informally and requested the plaintiff to do the work and furnish the materials for which the action is brought. The plaintiff was the agent of the owners

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of the rooms, and as such had negotiated with the defendant's officer for the lease of the rooms. The committee promised the plaintiff that he should be paid for such services and material aside from the \$400 a year which his principals were to receive for the rent of the rooms. The plaintiff thereupon caused the work to be done and the materials to be furnished, and the city officer took possession of the rooms so furnished in the latter part of November, 1874. On the 9th of December, 1874, the common council held a meeting in said rooms and by resolution accepted them as fitted up by the plaintiff, and authorized a lease to be taken in accordance with the terms of the previous resolutions, and such lease was afterwards executed on the part of the owners and lessors by the plaintiff as their agent. That the fact that the committee had promised the plaintiff compensation, aside from the contemplated rent of \$400 a year, was not made known to the common council until after the execution of the lease:

Held, that the common council could delegate to a committee power to procure the necessary furniture for the rooms. That the principle that public powers or trusts devolved by law upon the governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others, does not apply to this case. The distinction is between acts *quasi* judicial, or involving discretion, and those which are merely ministerial.

Held, also, that the acceptance of the furnished rooms by the common council was a ratification of the action of the committee.

The position that the common council had no authority to appoint upon the committee a person not a member of their body, is untenable.

Held, further, that the plaintiff is not estopped from recovering, by his action respecting the lease. The defendant's committee well knew that the furniture was provided by the plaintiff, and not by his principal, and that it was to be paid for, aside from the rent of the rooms, and their knowledge on the subject is to be treated as the knowledge of their principal.

Fourth Department, General Term, January, 1881.

Before TALCOTT, P. J., SMITH and HARDIN, JJ.

APPEAL from a judgment, entered and docketed in Jefferson county, January 30, 1879, on the report of a referee. The judgment was in favor of the defendant and against the plaintiff, dismissing his complaint with costs. The action was commenced to recover of defendant, a municipal corporation, for work and labor performed, materials furnished

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and money paid out for the defendant by the plaintiff in building desks, cupboard, platforms and other furniture, including the frame work of a sign, with which to furnish for the use and occupation of the city certain rooms leased by defendant of the widow and heirs-at-law of one Lawrence Hayes deceased. The defendant was a duly incorporated city, having its mayor and common council, and the rooms were leased for the use of defendant's officers, and consisted of a mayor's office and common council room, recorder's office and court room, city chamberlain's office, police office, &c. In making the lease with defendant, the plaintiff acted as the agent or attorney in fact of the widow and heirs, who were the owners of the premises. At a regular meeting of defendant's common council, on the evening of September 22, 1874, the plaintiff made proposals to said council on behalf of his principals, to lease to defendant certain rooms on Court street in said city, to put them in condition for occupation at an annual rent of \$400 per year.

The rooms were on the second floor in Hayes' block, and at this time were not adapted to the needs or wants of the city, and for that purpose must be reconstructed. The plaintiff had his map or plan before the common council, which represented the rooms as he proposed to reconstruct them. The plan and proposals made by plaintiff on behalf of his principals were accepted by defendant's common council, by resolution of September 22, 1874, in these words: "*Resolved*, That the city take from Mr. Edwards a lease of his rooms on Court street for five years with the privilege of ten years if desired." The above facts were found by one Wayland F. Ford, the referee in the action; and he also found the further fact that the plan and proposals thus made and accepted did not indicate or include in any measure, any part or portion of the work, labor or materials for which the plaintiff sued to recover in this action; and that there was no proposal or agreement on the part of plaintiff or his principals to do this specific work under the agreement for the leasing of the rooms. At the same meeting

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of the common council which passed the resolution accepting plaintiff's plan and proposals for the leasing of the rooms, the mayor of the city appointed a committee of four persons, three of whom were aldermen and one the recorder of the city, to arrange the rooms and procure the necessary furniture. The referee found, as facts, that the appointment of this committee by the mayor was the act of defendant's common council; that this committee employed the plaintiff to do the work and furnish the materials in question; that they agreed he should be paid for the same aside from the rent of \$400 a year, which was to be paid to his principals; that the plaintiff caused the work to be done and furnished the materials, which were worth the amount charged therefor and alleged in the complaint, under the agreement that he was to be paid for the same by the defendant. The acting members of the committee were Andrew J. Moore, one of the aldermen, and Laban H. Ainsworth, the recorder of the city. The common council moved into the rooms about the middle of November, 1874, and continued to occupy and were in possession of the rooms and furniture at the time this action was commenced.

On December 9, 1874, at a regular meeting of the defendant's common council, a resolution accepting the rooms in question was passed. The resolution was as follows: "*Resolved*, That the city rooms, as fitted up by Mr. Edwards, be accepted, and that the city attorney be and he is hereby authorized to draw a lease of the rooms for five years, with a privilege to the city of extending the lease to ten years or longer at an annual rent of \$400 per year, payable quarterly, rent to commence December 1, 1874."

The lease was signed on behalf of the city by W. F. Porter, mayor, and by the city chamberlain, and on behalf of the heirs of the Hayes' estate by John Edwards, the plaintiff, as attorney, and was dated December 1, 1874. The referee found, among other conclusions of law and fact, the following: "The common council is by law and the charter made the governing body of the corporation, and has power to rent

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rooms for the meetings of the common council and rooms for the recorder's court, and purchase furniture for the rooms, and pay for the same as a part of the ordinary expenses of the city. So far as the arranging the rooms, procuring the necessary furniture and the amount of money to be expended for such purposes is concerned, the entire discretion vested in the common council was attempted to be delegated to a committee of four, one of whom was not a member of the common council. This I am of the opinion could not be done, and the committee could not make any contract binding upon the defendant. The plaintiff is chargeable with knowledge of want of power in the committee to make the contract. It is now claimed that defendant is liable on an implied agreement or assumpsit to pay for the work and materials. The authorities show beyond question that the defendant would be liable upon an implied agreement as well as upon an express contract, the contract not being *ultra vires*. It is an elementary principle of the law of contracts that in all cases the assent of the contracting parties must be shown. In an express contract an express promise or agreement is shown; in an implied contract the assent of one or both parties is implied from their acts, as in *Dunn agt. St. Andrews Church* (14 *John.*, 117), where such an implication was made against a party from making payments on the contract. In this case it is impossible to infer from the evidence that the common council ever assented to the contract. The defendant used the rooms with the fixtures and articles for which plaintiff claims to recover, but such use was not under the contract made with the committee, but under the lease made with plaintiff's principals through plaintiff's agency, and the use under the contract would not render the defendant liable by reason of an implied assumpsit. It is not claimed the defendant has ratified the contract of the committee and is liable upon that ground. The authorities show that the defendant would be liable if a ratification was shown. But the evidence fails to show a ratification. A

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ratification can only be made out and established from acts of the common council after the time the contract came to their knowledge, or it would be necessary to show an adoption of this contract by the common council or an agreement to be bound by it. The evidence shows that the common council repudiated the contract as soon as it came to their knowledge. They continued to occupy the rooms as fitted up, but claimed the right so to do under the terms of the lease. And such occupancy would not operate as a ratification of the contract made by the committee.

There is another principle which effectually precludes the plaintiff from recovery in this action. The plaintiff was seeking to obtain for his principals a valid contract of lease of these rooms for a term of years. A valid contract for more than one year could only be had by obtaining a written lease signed by the mayor of the city, who is the officer authorized to sign leases under the direction of the common council. The negotiations resulting in the lease were conducted throughout by the plaintiff on behalf of the owners of the rooms.

Plaintiff, therefore, is charged with knowledge of the terms of the resolution of December 9, 1874, and when he executed the lease on behalf of his principals, the mayor had authority to execute for the corporation when authorized by the common council. The plaintiff was bound to inquire as to the authority given the mayor. The negotiations must be regarded as continuing down to the time when the written lease was executed. The resolution of December ninth and the lease, by their terms, gave the defendant the use of the rooms, and the fixtures and materials for which this action is brought for the annual rent of \$400 per year. The plaintiff is so connected with the lease as to preclude and estop him from recovery in this action. The execution of the lease and the assent of the plaintiff to the resolution of December ninth, amounts to a representation on the part of plaintiff that the defendant would get the use of the rooms, as the plaintiff had fitted them up for the annual rent of \$400.

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Relying upon that, the defendant entered into a valid contract of lease with plaintiff's principals for a term of years, and the plaintiff is estopped from making any further claim, either in his own behalf or in behalf of his principals. The plaintiff obtained an additional advantage for his principals in obtaining the written lease, for until that was signed, the defendant was only tenant from year to year, and could have terminated the tenancy at the end of any year. For these reasons the defendant is entitled to judgment, that the plaintiff's complaint be dismissed.

Anson B. Moore, for appellant.

I. The expenses of fitting up and furnishing lights, furniture, &c., for the city rooms, are properly chargeable to the city. The common council may make the expenditures, and the same, by the express language of the city charter, "shall be included in the ordinary expenses of the city, and payable out of the general fund" (*Watertown City Charter*, title V., sec. 3, sub. 4, page 44; *Session Laws* 1869, chap. 714). The common council may delegate ministerial or administrative duties to a committee (*Dillon on Municipal Corp.*, sec. 60). Where the duties are ministerial, less than a majority may act (*Dillon on Corp.*, 249, note, sec. 22). They need not be convened or act as a board. They may act informally (*Dillon on Corp.*, 249, note). Where an act is performed by one of a committee, the consent of the rest is presumed (*Dillon on Corp.*, 249; 21 *Wend.*, 178; *Angel & Ames on Corp.*, 216-218, and cases there cited). Nothing but the oath of the dissenting members will overthrow the presumption (21 *Wend.*, 178). The committee was regularly and legally appointed. The referee so found. The power and authority conferred on this committee by defendant's common council was to "arrange the rooms and procure the necessary furniture." They were the agents of defendant specially appointed for such purpose, and such agency was lawfully conferred. It was the province, as well as duty, of the common council to

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appoint a committee for the purpose intended rather than that the labor required of said committee should be performed by the common council in person. In general, the only way in which a corporation aggregate can act or contract is through the intervention of agents, either specially designated by the act of incorporation or appointed and authorized by the corporation, in pursuance of it (*Coke upon Lit.*, b. 66; *Angel & Ames on Corp.*, secs. 276, 283; *The Planters and Merchants' Bank* agt. *Andrews*, 8 *Porter* [Ala.] *R.*, 404; *Randall* agt. *Van Vechten* 19 *Johns.* [N. Y.] *R.*, 65; *Owings* agt. *Speed*, 5 *Wheat.* [U. S.] *R.*, 424; *Hoven* agt. *The New Hampshire Asylum*, 13 *N. H. R.*, 532; *Smith* agt. *Natchez Steamboat Co.*, 1 *How.* [Miss.] *R.*, 478). While the referee in this case holds and decides that the power or authority "to purchase the necessary furniture for the use of the city rooms," was duly conferred by the city charter on defendant's common council, yet such power or authority could not be delegated to the committee. In other words, the common council must go as a body and inspect, purchase and arrange each and every article of furniture necessary for the rooms, in order to make their acts legal or binding on the defendant. It is submitted that the ruling and decision of the referee upon this question is clearly erroneous, and for which the judgment should be reversed. The general principle that a corporation may delegate to agents the performance of any act which it can itself perform is well established (*Sharp* agt. *The Mayor and Aldermen of New York*, 40 *Barb.*, 256, 257; *Randall* agt. *Van Vechten*, 19 *John.*, 60; 22 *Wend.*, 352; *Dubois* agt. *The Delaware and Hudson Canal Co.*, 4 *Wend.*, 288; *Brockway* agt. *Allen*, 17 *Wend.*, 40; 5 *Hill*, 107; *Gale* agt. *Nixon*, 6 *Cow.*, 448; 36 *How.*, 485; *Haight* agt. *Sohler*, 30 *Barb.*, 218; 7 *Cow.*, 485; 2 *Hill*, 451; 25 *How.*, 389; *Staunton* agt. *Camp*, 4 *Barb.*, 276; 1 *Kern.*, 200; *Hicks* agt. *Hinde*, 9 *Barb.*, 529; 7 *Cranch.* [U. S.] *R.*, 299; 2 *Pick.*, 352; 19 *N. Y. R.*, 315; *Warrall* agt. *Munn*, 1 *Seld.*, 229; *Ford* agt. *Williams*, 3 *Kern.*, 585; *Taft* agt. *Brewster*, 9 *John.*, 334;

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White agt. *Skinner*, 13 *Johns.*, 310). The following propositions are, therefore, clearly established: 1. The appointment of the committee, aldermen Moore, Sloat and others, by the mayor of the city to "arrange the rooms and procure the necessary furniture," was the act of the defendant's common council, and was legitimate, legal and proper. 2. The said committee duly employed the plaintiff to do the work and furnish the materials for which this action is brought, under the express agreement that the defendant would pay him for the same; that he caused the work to be done and furnished the materials in good faith in pursuance of the agreement made with said committee, and that the same were worth the amount charged therefor. 3. That the work performed and materials furnished by plaintiff were expended solely to make and "procure the necessary furniture," and that the same was not only necessary but indispensable to enable defendant to use and occupy the rooms in question. 4. That the members of said committee were the duly appointed and legally authorized agents of defendant; that in the employment of plaintiff to do the work and furnish the materials in question, they did not exceed the power and authority conferred upon them by said common council, but such appointment for the purposes indicated carried with it the necessary power and authority to do just what the common council might do, "arrange the rooms and procure the necessary furniture," and the defendant is as sacredly bound by the acts of its committee as it could be were said acts done by the common council in person.

II. Municipal corporations, in their private character, as owners and occupiers of houses, lands, &c., are regarded in the same light as private corporations, and as individuals, and are dealt with accordingly. A contract binding on a private corporation or an individual will be alike binding on a municipal corporation (*Angel & Ames on Corp.*, 17, 18, 19, 31, *note*; *Bailey* agt. *Mayor, &c., of New York*, 3 *Hill*, 531; *Wilcox on Mun. Corp.*, 2; *Moodalay* agt. *East India*

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Co., 1 *Brown Ch. R.*, 469; *Miller's Hist. Views of Eng. Gov't.*, 340; 1 *Kyd R.* 43-63; *Madox Hist. Eng. Exch.*, 402). It is not necessary that a municipal corporation should act under seal, in order to bind themselves, or to obligate others to them. A vote of the body or a legal quorum is sufficient for this purpose (10 *Abb. Pr. R.* [*N. S.*], 484; *Jackson agt. Hartwell*, 18 *Johns. [N. Y.] R.*, 422; *Angel & Ames on Corp.*, 21, *note*). A corporation can make any contract which is not in contravention of its charter or in violation of express statutory law, and the same is as binding upon it as upon an individual. It has power to make all such contracts as are necessary and usual in its course of business, as means to attain the object for which it was created, even where the charter or act of incorporation and statutory law are silent as as to what contracts it may make (15 *John. R.*, 383; 2 *Cow. R.*, 699; 13 *Peter's [U. S.] R.*, 551; *Angel & Ames on Corp.* [3 *ed.*], 250; *The United States agt. Aundy*, 11 *Wheat. R.*, 412; *Beaston agt. The Farmers' Bank of Delaware*, 12 *Peters' [U. S.] R.*, 135). A corporation keeping within the scope of its general powers may contract or bind itself to do any act at any place, and when the engagement is broken it will be equally liable (12 *John.*, 229; 7 *Cow.*, 540; 1 *Hilt.*, 562; *Bank of Utica agt. Lundes*, 3 *Cow.*, 684; *McCall agt. Byrone Manuf. Co.*, 6 *Conn. R.*, 420; *Dunn agt. Rector, &c., of St. Andrews*, 14 *John.*, 118; 9 *Paige*, 496; 17 *N. Y. R.*, 449). It is well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done under the corporation seal. That it may as well be bound by express promises through its authorized agents as by deed, and that promises may as well be implied from its acts and the acts of its agents as if it had been an individual (*Bank of Columbia agt. Patterson's Administrators*, 7 *Cranch [U. S.] R.*, 305, 306; 5 *Wheat.*, 326; *Brady agt. Mayor of Brooklyn*, 1 *Barb.*, 584; *St. Mary's Church agt. Carr*, 6 *Barb.*, 576; *Fleckner agt. U. S. Bank*, 8 *Wheat.*,

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357; *Bank of U. S.* agt. *Dandridge*, 12 *Wheat.*, 68; *Peter-son* agt. *Mayor of New York*, 17 *N. Y. R.*, 449; *Dunn* agt. *Rector of St. Andrews' Church*, 14 *John.*, 118; *American Ins. Co.* agt. *Oakley*, 9 *Paige*, 496; *Watson* agt. *Bennett*, 12 *Barb.*, 196; *Foster* agt. *La Rue*, 15 *Barb.*, 623; *Angel & Ames on Corp.* [8th ed.], 212; *N. Y. R. R. Co.* agt. *New York*, 1 *Hilt.*, 587; *Murrick* agt. *Burlington P. R. Co.*, 11 *Iowa*, 75; *Buckley* agt. *Briggs*, 30 *Missouri R.* 452; 34 *N. Y. R.*, 30). It has been held express authority, not indispensable, to confer upon a corporation the right to borrow money, to deal on credit, &c. (*Mann* agt. *Commission Co.*, 15 *John.*, 44; *Chitty on Bills* [5th ed.], 17-21; *Bay-ley on Bills* [5th ed.], 69, 70; 9 *Paige Ch. R.*, 470; *Angel & Ames on Corp.*, 234; *Morse* agt. *Oakley*, 2 *Hill.*, 265). A charter may be presumed to have been given to persons who have long acted as a corporation (*Bank of U. S.* agt. *Dandridge*, 12 *Wheat.*, 71). To bind a corporation it is not necessary to show a written instrument or a vote of acceptance on the corporation books. From the same species of evidence the enactment and repeal of by-laws have been inferred (12 *Wheat.*, 71; 1 *Roll R.*, 82; 1 *Vent.*, 289; *The King* agt. *Aundy*, 1 *T. R.*, 575; 2 *T. R.*, 515; *Newberry* agt. *Francis*, 3 *T. R.*, 187; *Middlesex, husbandman*, agt. *Davis*, 3 *Met.*, 133; *Wetumpka R. R. Co.* agt. *Bingham*, 5 *Ala. R.*, 657; *Union Bank of Maryland* agt. *Ridgley*, 1 *Harris & Gill [Md.] R.*, 419, 420; *Attorney-General* agt. *Middleton*, 2 *Ves. Sen.*, 328; *Bank of U. S.* agt. *Dandridge*, 12 *Wheat. [U. S.] R.*, 105, *per* MARSHALL, *Ch. J.*; *Wood* agt. *Tate*, 5 *Bos. & Pull. R.*, 575; *The King* agt. *The Inhabitants of Chippsey-Norton*, 5 *East R.*, 240; 1 *Kyd on Corp.*, 263; *Doe* agt. *Woodman*, 8 *East R.*, 228; *Dean & Chapter of Rochester* agt. *Pierce*, 1 *Comp. [N. S.] R.*, 446; *Mayor, &c., of Stafford*, agt. *Tell*, 4 *Bing. R.*, 75; *Angel & Ames on Corp.* [8th ed.], 213; *Lowe* agt. *London R. R. Co.*, 18 *Q. B.*, 632; 9 *Eng. Law & Eq.*, 489).

III. The committee appointed in this case consisted of

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three of defendant's aldermen and its recorder, Laban H. Ainsworth. The objection was made by defendant's counsel on the trial, that the recorder could not be legally appointed on the committee. This objection is not tenable. Ainsworth was as much a member of the committee and as much the agent of defendant as any other member. The common council has power to appoint any person its agent to do its business the same as a natural person (*Angel & Ames on Corp.* [3 ed.], 258, 267, 268, 269). The plaintiff dealt with Ainsworth and Moore, the acting members of said committee, in perfect good faith, as the agents of defendant, clothed with power and authority to purchase "the necessary furniture and arrange the rooms." By the solemn act of defendant's common council these men were held out to the plaintiff and the public as its duly authorized agents, and upon every principle of justice and equity defendant is estopped from denying it, and is bound by their acts. Plaintiff had the right to presume that in the appointment of said committee for the purposes indicated defendant did not exceed its chartered power or authority (*Akin agt. Blanchard*, 32 *Barb.*, 527; *Hope Mutual Life Insurance Co. agt. Taylor*, 2 *Robt.*, 278; 599; 22 *N. Y. R.*, 258; 36 *Barb.*, 420; *affirmed in* 40 *N. Y. R.*, 168; *Sharp agt. Mayor, &c., of New York*, 40 *Barb.*, 256; 25 *How. Pr. R.*, 389). It is submitted that the defendant is liable upon the express contract made with plaintiff by its duly authorized agents, and that the judgment for the reasons aforesaid should be reversed.

IV. The plaintiff completed his contract, made with the committee to furnish the rooms in question, in November, 1874, and so reported to the acting members thereof, Moore and Ainsworth; he rendered to them an account of the work done and the materials furnished; they looked over said account with plaintiff and duly approved the same and certified its correctness, and made a report thereof to the defendant's common council at its first meeting after the work was done. No objection was made to said report by said common

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council. Defendant took immediate possession of the rooms and furniture, and thereafter and on the ninth day of December defendant's common council, at a regular meeting thereof, passed a resolution accepting said rooms as fitted up by the plaintiff. From these undisputed facts it follows: "1st. That the defendant had notice of the contract made with plaintiff, and of its complete performance on his part. Notice to defendant's agents in the transactions in which they were engaged, was notice to the principal. This rule applies equally to a corporation as to a natural person (*Lawrence agt. Tucker*, 7 *Green [Me.] R.*, 195; *Bank agt. Whitehead*, 10 *Watts [Penn.] R.*, 397; *Boggs agt. Lancaster Bank*, 7 *Watts & Serg. [Penn.] R.*, 336; *McEwen et al. agt. The Montgomery County Mutual Insurance Company*, 5 *Hill R.*, 101; *Trenton Banking Company agt. Woodruff*, 1 *Green [N. J.] Ch. R.*, 117; *Angel & Ames on Corp.* [3d ed.], 299). 2. The work done and materials furnished were duly accepted by defendant. The accounting between the plaintiff and defendant's agents, Moore and Ainsworth, and the acceptance of the work by them was the act of defendant and binding on it. 3. In taking possession of the rooms and furniture in question, and passing the resolution of acceptance of December 9, 1874, the common council adopted and duly confirmed the contract made with plaintiff by their committee, and are estopped from denying or repudiating the same. 4. The conclusions of the referee are, therefore, in direct conflict with both the law and the conceded facts in the case. *Sub. a.* The plan and proposals for leasing the rooms to defendant, and accepted by defendant's common council, did not include any part or portion of the work and materials constituting the furniture, for which plaintiff claims to recover. *Sub. b.* Each and every member of the common council had personal knowledge that the plaintiff had been employed by this committee to do the work and furnish the rooms in question. Aside from the fact that the same was not included in, or made any part of, the contract for leasing, and not in the plan and proposals accepted,

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they were present and saw the plaintiff doing the work, and were informed by the members of the committee that plaintiff was employed to do the work and they well knew under what terms he was doing it; hence, the fact was known to them that the furniture was being made by plaintiff under a different and distinct contract from the contract of leasing. *Sub. c.* In view of the foregoing conceded facts the special pleading of the referee in his opinion in which he perverts and misapplies, among other principles, those of estoppel, and seeks to make legal precedents and authorities yield and bend in manifest divergence from the principles of justice, equity and right, to enable the defendant to cheat and defraud the plaintiff out of all honest and just claims, if not unprecedented, is, to say the least, quite remarkable. No principle of law is better settled than that "one who is not bound by his covenants cannot take advantage of an estoppel" (*Lansing agt. Montgomery, 2 John.*, 382). One party not estopped unless the other is; an estoppel is reciprocal and binding on both parties (8 *Wend.*, 480; 5 *Hill.*, 183; 32 *N. Y. R.*, 280; *Clute agt. James, 28 N. Y. R.*, 280). Yet the referee overturns and subverts this just and equitable rule, and holds and decides the monstrous proposition that defendant's common council could repudiate a just contract made with plaintiff by their duly authorized agents to fit up and furnish with "necessary furniture" rooms for their use and occupation; and that they could continue to occupy the rooms so fitted up, and use and enjoy the furniture that they had thus dishonestly obtained, for a period of ten years if they so desired, without payment for the same; and that plaintiff was estopped from a recovery, and from the enforcement of a just, fair and honest contract, entered into on his part in perfect good faith. Instead of applying the doctrine of estoppel to protect the plaintiff in his rights, and in the enforcement of an honest contract against defendant, its aid is here invoked, first to perpetrate and then perpetuate injustice, outrage and wrong.

V. The defendant is liable upon an implied contract for

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the labor and materials in question. Assumpsit lies on an implied promise against a corporation as well as an individual (*Dunn* agt. *The Rectors, Wardens, &c., of St. Andrews' Church*, 14 *John. R.*, 117, 118; *Mott* agt. *Hicks*, 1 *Cow.*, 513; *Baker* agt. *Mechanics Ins. Co.*, 3 *Wend.*, 94; 7 *Cranch* [*U. S.*], *R.*, 279-307; 12 *John. R.*, 227; 19 *John.*, 65; 12 *Wheat.*, 64-67; 30 *Barb.*, 218; 1 *Halst.*, 115; 3 *Halst.*, 191, 192; 19 *Johns.*, 283, 284; *Cow.*, 340; 22 *N. Y. R.*, 258; 34 *N. Y. R.*, 30-74; 2 *Robb*, 282; 1 *Harris & Gill* [*Md.*] *R.*, 324; 5 *Wheat.*, 326; *Hills* agt. *Bannister*, 8 *Cow.*, 31). All duties imposed on corporations aggregate by law, and all benefits conferred at their request raise implied promises, for the enforcement of which an action will lie (*Salem Bank* agt. *Gloucester Bank*, 17 *Mass. R.*, 1, 33, 479; 8 *Pick.* [*Mass.*] *R.*, 178; *Bank of Kentucky* agt. *Wester et al.*, 2 *Peters*, 318; 11 *Mass.*, 113; 14 *Mass.*, 172; *Amherst Academy* agt. *Cowles*, 6 *Pick.* [*Mass.*] *R.*, 427; *Kenedy* agt. *Baltimore Ins. Co.*, 3 *Harris & John.* [*Md.*] *R.*, 367; *Stone* agt. *Congregational Society of Berkshire*, 14 *Vt.*, 86; 1 *Halst.* [*N. J.*] *R.*, 115; 14 *John.*, 118; 1 *Pennington* [*N. J.*] *R.*, 347; 3 *Halst.* [*N. J.*] *R.*, 119; 19 *John. R.*, 284; *The Chestnut Hill and Spring House Turnpike Co.* agt. *Butler*, 4 *Serg. & Rawle* [*Penn.*] *R.*, 6; *Angel & Ames on Corp.* [3d ed.], 214, 215). Assumpsit, as well as case, may be maintained against a corporation aggregate for default in any duty imposed by law, for such duty raises an implied promise of the corporation (*Kortwright* agt. *Buffalo Commercial Bank*, 20 *Wend.*, 347, 348; *affirmed in court of errors*, 22 *Wend.*, 348; *Taylor's Landlord and Tenant* [6th ed.], secs. 635, 636, pages 489, 490). A contract may be implied against a corporation, and it may affirm the acts of an assumed agent and thus be bound by them (20 *Wend.*, 91; 22 *Wend.*, 384; 4 *Cow.*, 645; 2 *Kent's Com.*, 288; 14 *Barb.*, 358; *Angel & Ames on Corp.*, 172, secs. 7, 8; *Bank of Lyons* agt. *Dennison*, *Hill & Denio's Sup.*, 398; *Harlem Gas Light Co.* agt. *Mayor of N. Y.*, 33 *N. Y. R.*, 309; *affirming*, 3 *Rob-*

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ertson, 100; 47 *N. Y. R.*, 475; 57 *Barb.*, 497; *Folger agt. Mitchell*, 3 *Pick.* [*Mass.*] *R.*, 396).

VI. Concede that the committee had no original power or authority to bind the defendant in this case, yet there was clearly a satisfaction of the contract by the defendant's subsequent acts. Where persons assuming to act as agents of a corporation, but, without legal authority, make a contract and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract and render the corporation liable (*Bank of Columbia agt. Patterson's Administrators, &c.*, 7 *Cranch* [*U. S.*] *R.*, 299; 19 *Johns.*, 60; 1 *Pick.* [*Mass.*] *R.*, 372; 12 *Wheat.*, 72; 14 *Johns. R.*, 118; 5 *Ala. R.*, 808; *Angel & Ames on Corp.* [8th ed.], 215; *Goody agt. The Colchester and Stone Valley Ry. Co.*, 15 *Eng. Law and Eq. R.*, 596-598, 599). Certain property was purchased by agents of a corporation who gave two notes in its own name and the corporation took possession; held, that it ratified their acts and could not set up a want of authority. (*Moss agt. Rossie Lead Co.*, 5 *Hill*, 137; *affirmed in Moss agt. McCullough*, 7 *Barb.*, 297; *American Ins. Co. agt. Oakley*, 9 *Paige's Ch. R.*, 496; *Ridgeway agt. The Farmers' Bank of Bucks Co.*, 12 *Serg. & Rawle* [*Penn.*] *R.*, 256; *Story on Agency*, 239; *Angel & Ames on Corp.*, 297, *note*). The ratification of an unauthorized act of its agent by a corporation is equivalent to a previous authority as in case of natural persons (*Fleckner agt. U. S. Bank*, 8 *Wheat. R.*, 363, *per* STORY, J.; 5 *Hill*, 137; 1 *Keys*, 216; *Essex Turnpike Co. agt. Collins*, 8 *Mass. R.*, 299; 22 *N. Y. R.*, 494; 34 *How. Pr. R.*, 136). Thus, conceding that defendant was not originally bound by the contract of its committee, yet its subsequent acts, in taking possession of the property and persisting in the right to hold the same, after notice of plaintiff's contract, is a ratification of the contract, and binds defendant to pay the plaintiff's claim for the work, labor and materials in question. The principal is deemed to have ratified a breach of instructions on the part of his agent if he do not dissent

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within a reasonable time after notice (*Russell* agt. *Witmore*, 3 *N. Y. Leg. Obs.*, 318; *Vianna* agt. *Barclay*, 3 *Cow.*, 281; *Johnson* agt. *Jones*, 4 *Barb.*, 369; *Berwick* agt. *Dusenbury*, 2 *Daly*, 107; 32 *How. Pr. R.*, 348).

VII. The defendant having received and enjoyed the benefits of the contract of its committee, is bound by it. It thus becomes wholly immaterial whether the contract was authorized or not. The same rule concludes defendant as a natural person. It cannot retain the property and yet evade payment for the same. The defendant has received the consideration of plaintiff's contract and has not restored or offered to restore it; and it cannot restore, nor would restoration do complete justice to plaintiff—hence defendant is bound to pay for the consideration received. “Where a corporation has received the consideration of a contract, and a restoration will not do complete justice, the other party may recover upon the contract although it was unauthorized” (*Russell* agt. *Michigan Southern and Northern Ind. R. R. Co.*, 22 *N. Y. R.*, 258; see, also, *DeGraff* agt. *American Linen Thread Co.*, 21 *N. Y. R.*, 124; reversing 24 *Barb.*, 375; 20 *Wend.*, 91; *Smith* agt. *Lowe*, 21 *N. Y. R.*, 296; 22 *Wend.*, 348; 16 *How.*, 36; 12 *John.*, 227; 9 *Paige*, 496; 6 *N. Y. Leg. Obs.*, 160; 17 *N. Y. R.*, 449, 584; 4 *Cow.*, 645; 4 *E. D. Smith*, 413; *Hooker* agt. *Eagle Bank of Rochester*, 30 *N. Y. R.*, 83; *Angel & Ames on Corp.*, secs. 7, 8; *Woodruff* agt. *Peterson*, 51 *Barb.*, 252; *Reed* agt. *Randall*, 39 *N. Y. R.*, 358). One who has in good faith dealt with a corporation, discounted paper, &c., can recover from it (*Mechanics' Banking Asso.* agt. *N. Y. Saugerties White Lead Co.*, 35 *N. Y. R.*, 505; affirming 23 *How. Pr. R.*, 74, and 29 *How.*, 509). It was held in the case of *The Vestry of St. Luke's Church* agt. *Matthews* (4 *Diss. [S. C.]*, *Ch. R.*, 587), that “where a clergyman entered into a contract with a vestry who were not legally elected, but were yet a vestry *de facto*, for a year's service, in ignorance of the illegality of the election and without collusion; that having

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performed the service he was entitled to recover of the church upon his contract." Defendant having received the benefit of the contract must pay upon the *quantum meruit*, or upon the *quantum valebunt* (*Brady* agt. *The Mayor, &c.*, opinion by DENIO, J., 20 *N. Y. R.*, 319; 28 *How. Pr. R.*, 214; 18 *Abbt.*, 369; 3 *Robt.*, 128; *affirmed in court of appeals*, 33 *N. Y. R.*, 309). Upon every principle of justice, equity and right the plaintiff should recover of the defendant in this action.

VIII. The referee holds and decides that the power to purchase furniture could not be delegated to the committee, because the discretion, as to the expense to be incurred as well as the articles to be procured, was intended to be conferred by said common council; and in his opinion he cites *Thompson* agt. *Schermerhorn* (6 *N. Y. R.*, 92) in support of his position and as decisive of the question. We submit the case cited has no application whatever to the case at bar. In that case the court held: "A municipal corporation in its ordinance requiring the leveling and paving of streets must conform strictly to the provisions of the statute giving it power to pass such ordinance, or its proceedings will be void," and the reversal of the judgment in that case was upon this distinct ground. The learned judge says in his opinion (*page* 96): "I am satisfied that the legislature intended to place the responsibility of determining the mode and manner, or, in other words, the plan of the improvement, upon the common council. The trust is an important and delicate one, as the expenses of the improvement are, by the statute, to be paid by the owners of the property in front of which it is made." This decision turned on the proper construction of the 34th section of "an act relative to the city of Schenectady" (*Laws of 1833, page* 457), which authorized the common council of said city to make "by-laws and ordinances ordering and directing any of the streets to be pitched, leveled, paved, flagged, &c.," and the court properly held that inasmuch as the expenses of the improvements were to be paid by direct

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taxation against the owners of the property in front of which the same were to be made, the express terms of the statute must be strictly complied with; and as the statute expressly required the common council themselves to "determine the manner in which the improvement should be made, they could not delegate that power to any officer or committee of the corporation." The referee in this case failed to see the plain distinction between the case at bar, where the common council delegates to a committee the power to "procure necessary furniture" for their use, to be paid for out of the general fund, and where the power of special and local taxation is sought to be delegated to officers of a corporation, or to a committee in direct and palpable violation of the express language of the statute, as in the case above cited.

W. F. Porter and *Charles H. Watts*, for respondent.

I. This action is brought upon express contract, alleged to have been made by plaintiff with defendant, and unless a valid contract is proven, the action cannot be maintained. 1. It is submitted that upon the proofs no contract between plaintiff and defendant has been proven, not even the semblance of one, and the referee so finds. A contrary finding would have been without evidence to sustain it. 2. The plaintiff relied upon and attempted to prove an express contract, and made no claim, either upon the trial or argument, to any right to recover upon any implied liability.

II. The defendant could contract only by or through its common council. The charter of defendant expressly provides that defendant shall contract only in this way, and in legal effect prohibits it from contracting in any other way, and this is the rule with all municipal corporations (*Laws of 1869, vol. 2, page 1701*). 1. The plaintiff does not allege, prove or claim to have made any contract with defendant, but alleges that he has made a contract with a committee of defendant; none having been made with the defendant

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through its common council, none can exist valid and binding on defendant.

III. It is claimed on the part of the plaintiff, that he made a contract for the performance of the work and furnishing of the materials with a committee, alleged to have been appointed by the defendant, consisting of three members of the common council and the recorder of defendant; that said committee was legally appointed; that the common council had authority thus to delegate its powers, and that the committee had power to, and did make a contract with plaintiff binding on defendant. This proposition we dispute, both upon the facts and as matter of law. 1. Upon the undisputed evidence in this case the common council did not appoint such committee. The evidence is, that such committee was appointed by the mayor without any authority from the common council. The mayor as such had no more power to do this than any other person; the appointment was, therefore, void. 2. Certainly he had no power, not even with the assent of the common council, to appoint, as one of such committee, the recorder, who was not a member of the common council.

IV. The common council has no legal right to delegate their powers or duties to others. It is a well settled principle that public power or trusts devolved by law upon a common council or governing body cannot be delegated to others. Such duties require the exercise of discretion and judgment, and the body or officers intrusted with it must discharge it themselves. The committee, therefore, could not by any act of theirs bind the defendant (*Dillon on Mun. Corp.*, sec. 60, 618; *Cooley's Const. Lim.*, sec. 204; *Lord agt. City of Olonto*, 47 *Wis. R.*, 500; *Powell agt. Tuttle*, 3 *Comstock*, 396; *Thompson agt. Schermerhorn*, 6 *N. Y. R.*, 92; *City of Troy agt. Winters*, 2 *Hun*, 63; *People ex rel. agt. Davis*, 15 *Hun*, 209; *Birdsall agt. Clark*, 73 *N. Y. R.*, 73; *Matter of Petition of Em. I. S. B.*, 75 *N. Y. R.*, 388; *Davis agt. Reid*, 65 *N. Y. R.*, 566).

1. The plaintiff grounds his cause of action upon a contract

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alleged by him to have been made with such committee. The contest on the trial was sharp over this question. The plaintiff relied upon such contract for a recovery, as the evidence indisputably shows. 2. The referee very wisely holds and decides as matter of law that the common council had no power to delegate its duties to a committee, and that the committee could not bind the defendant by any contract it may have attempted to make. 3. *Dillon on Municipal Corporations* (sec. 60) says: "The principle is a plain one that public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. Such a delegation of power is void. Powers of this kind must be exercised in strict conformity with the charter or incorporating act." And at section 618 the same principle is reaffirmed. 4. In *Dag agt. Gray* (4 *Cushing*, 433); the charter of the city prohibited moving buildings through the streets, without license from the mayor and aldermen. Authority to grant such license was delegated by the aldermen to the mayor; held void and no protection to the mayor; that such power could not be delegated. 5. In *Thompson agt. Schermerhorn* (6 *N. Y. R.*, 92); the common council in this case were authorized by the charter of the city of Schenectady to pave, level and flag the streets of the city under the superintendence of the city superintendent. The common council made an ordinance directing this work to be done under the direction of its committee on roads. Held, such ordinance was void; that the council could not delegate its powers to any officer or committee of the corporation. 6. *Birdsall agt. Clark* (79 *N. Y. R.*, 73). In this case the common council of the city of Binghamton were empowered by the charter of the city to require the building and maintaining of sidewalks at the expense of the owners of adjoining premises; the council by resolution directed the superintendent of streets to cause the work to be done when the owners neglected to do so. In an action to restrain the super-

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intendent from doing the work, held, the action maintainable and resolution void, on the ground that such duties could not be delegated to another. In this case *Thompson agt. Schermerhorn (supra)* is cited and approved. 7. *Matter of Petition of Emigrants' Savings Bank to vacate assessment, &c.* (75 *N. Y. R.*, 388). In this case the common council of the city of New York were authorized to improve certain streets and levy an assessment to defray such expenditure. The council, by an ordinance directed the "commissioner of public works" to do such work. Work was done and assessment made. Petitioner takes proceedings to vacate assessment. Held, assessment void; the council had no power to delegate their duties. In this case *Thompson agt. Schermerhorn* and *Birdsall agt. Clark* are cited and approved. In each of the cases cited, the duties attempted to be delegated were not *ultra vires*, but were devolved upon the governing body by law, and in most of the cases the work was done, the benefit derived from it received and enjoyed, yet the authority conferred being void, no legal liability was created. An individual contracting with public officers must take notice of their powers; he is charged with knowledge of the law, and makes a contract in violation of law at his own risk (*Parr agt. Village of Greenbush*, 72 *N. Y. R.*, 462).

V. Within all the authorities there was no power to appoint as a member of the committee a person not a member of their body. The recorder of the city could not be clothed with power to discharge the duties of the legislative and executive departments of the city government. Such a case is without precedent (*Day agt. Green*, 4 *Cushing*, 433).

VI. If the common council had power to delegate the performance of its duties to others, and if such committee were legally appointed, the delegation by the committee of the authority with which they were clothed to one of their number, as was done in this case, was illegal and void. If the committee were clothed with any power it was not a mere ministerial duty, but involved the exercise of their judgment

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and discretion, and could not be delegated. Upon the undisputed evidence in this case the members of the committee, without any meeting for that purpose, or action in concert, delegated their duties to Ainsworth. The contract, if any, was made by him alone; all the work done, or directed to be performed, was authorized by him; manifestly such contract is void and cannot be enforced against defendant (*Dillon on Mun. Corp.*, secs. 221 to 228; *Downing* agt. *Rugar*, 21 *Wend.*, 178; *Keeler* agt. *Frost*, 22 *Barb.*, 400; *Powell* agt. *Tuttle*, 3 *Comstock*, 396; *City of Troy* agt. *Winters*, 2 *Hun*, 63; *Cook* agt. *Ward*, 20 *Moak's Eng. R.*, 5, 14).

VII. There can be no recovery upon a *quantum meruit* or implied liability, said to have been created against defendant, neither upon the law or facts in this case, and the referee so finds. The contract being absolutely void, no obligation was created against defendant; neither can one be implied under such a contract. It is an elementary principle of the law of contracts, that in all cases the assent of the contracting parties must be shown. In an express contract by an express promise; in an implied contract there must be some act from which their assent can be implied (*Brady* agt. *The Mayor, &c.*, 20 *N. Y. R.*, 312; *Bonesteel* agt. *The Mayor, &c.*, 22 *N. Y. R.*, 162; *Coven* agt. *Village of West Troy*, 43 *Barb.*, 48; *Donavan* agt. *The Mayor, &c.*, 33 *N. Y. R.*, 291; *City of Troy* agt. *Winters*, 2 *Hun*, 63; *Barnes* agt. *The Mayor, &c.*, 5 *Sup. Ct. R.*, 371; *McDonald* agt. *The Mayor, &c.*, 68 *N. Y. R.*, 23; *Parr* agt. *Village of Greenbush*, 72 *N. Y. R.*, 463; *Francis* agt. *City of Troy*, 74 *N. Y. R.*, 338; 75 *N. Y. R.*, 65; 2 *Clifford R.*, 590; 77 *N. Y. R.*, 130). The evidence shows that the common council of defendant had no knowledge of the agreement plaintiff alleges he made with the committee, or of the fact that plaintiff had been promised compensation for the work, &c., aside from the contemplated rent of \$400 per year, till long after the work was completed and after the execution of the written lease of the premises in question.

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VIII. The contract being void there could be no ratification ; and if there could be, there was none in this case. The referee expressly finds there was none, and such finding is abundantly supported by the evidence ; and there can be no ratification in any case, unless the party claimed to have ratified, had full knowledge of all the facts (*Rowen* agt. *Hyatt*, 45 *N. Y. R.*, 138 ; *Lyman* agt. *Wykoff*, 10 *N. Y. R.*, 224 ; *Nixon* agt. *Polman*, 8 *N. Y. R.*, 398 ; *Cuyler* agt. *Mansfield*, 5 *Hun*, 559 ; *Dickinson* agt. *City of Poughkeepsie*, 75 *N. Y. R.*, 65).

IX. There is another principle which effectually precludes the plaintiff from recovery in this action, and that is the principle of estoppel ; and the evidence in this case warrants the judicial application of the equities of that rule to the plaintiff in its superlative sense ; he should be precluded from denying what his declarations and conduct have asserted (*Tilden* agt. *Nelson*, 27 *Barb.*, 595 ; *Dougherty* agt. *Topping*, 4 *Paige*, 94 ; *Simmons* agt. *McLaughlin*, 35 *N. Y. R.*, 647 ; *Edgarson* agt. *Thomas*, 9 *N. Y. R.*, 40 ; *Dezell* agt. *Odell*, 3 *Hill*, 215 ; *Blair* agt. *Wait*, 69 *N. Y. R.*, 113 ; *Smith* agt. *Rathbun*, 75 *N. Y. R.*, 122).

SMITH, J. — The action was brought to recover for work and labor performed, materials furnished and money paid out for the defendant, a municipal corporation, in fitting up certain rooms leased by the defendant, and furnishing them with fixtures and furniture for the use of the defendant's officers.

The referee found that at a regular meeting of the common council of the defendant, held on the 22d September, 1874, it was resolved to take a lease of the rooms in question for five years, with a privilege of ten years if desired, at a rent of \$400 a year, and at the same meeting the mayor of the city, as the presiding officer of the common council, appointed a committee consisting of three members of the common council and the recorder of the city, to arrange the

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rooms and procure the necessary furniture. The action of the mayor was approved by the common council. The referee also found that said committee, after their appointment, met informally, and requested the plaintiff to do the work and furnish the materials for which the action is brought. The plaintiff was the agent of the owners of the rooms, and as such had negotiated with the defendant's officers for the lease of the rooms. The referee found that the committee promised the plaintiff that he should be paid for such services and materials aside from the \$400 a year which his principals were to receive for the rent of the rooms. The plaintiff thereupon caused the work to be done and the materials to be furnished, and the city officers took possession of the rooms so furnished in the latter part of November, 1874. On the 9th December, 1874, the common council held a meeting in said rooms, and by resolution accepted them as fitted up by the plaintiff, and authorized a lease to be taken in accordance with the terms of the previous resolution, and such lease was afterwards executed on the part of the owners and lessors by the plaintiff as their agent. The referee found that the fact that the committee had promised the plaintiff compensation, aside from the contemplated rent of \$400 a year, was not made known to the common council until after the execution of the lease.

The referee held, among other conclusions of law, that the committee had no power to bind the defendant by their contract, and that the plaintiff, by his dealings with the defendant on behalf of his principals, is estopped from recovering upon his claim.

It is contended in behalf of the defendant that the common council could not delegate to a committee power to procure the necessary furniture for the rooms; that the power involved the exercise of discretion, as to the cost especially, and could not be delegated. It is a plain principle that public powers or trusts devolved by law upon the governing body of a municipal corporation, to be exercised by it when, and

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in such manner as it shall judge best, cannot be delegated to others. But it is not clear that the principle applies to this case. The distinction is between acts *quasi* judicial, or involving discretion, and those which are merely ministerial. The cases cited by the respondent's counsel are of the former class. In most of them the governing body undertook to delegate a public trust by a general grant of power. Thus in *Day agt. Green* (4 *Cush.*, 433) the aldermen of a city delegated power to the mayor to grant licenses to move buildings through the streets, and in *Thompson agt. Schermerhorn* (6 *N. Y.*, 92) the common council of the city of Schenectady, being authorized to pave, level and flag the streets of the city, under the superintendence of the city superintendent, made an ordinance directing the work to be done under the direction of its committee on roads (*Birdsall agt. Clark*, 73 *N. Y.*, 73). In *Matter of Petition of Emigrants' Savings Bank* (75 *N. Y.*, 388), and *People ex rel. agt. Davis* (15 *Hum.*, 209) are of the like nature. To apply the doctrine of these and numerous other concurrent decisions to the present case would be to hold that it was necessary for the common council, as a body, to buy or contract for the making of each article of furniture for the rooms in question, in order to bind the defendant. We do not think the case is within the doctrine above stated. The power conferred was limited to the procuring of necessary furniture for the rooms in question. In a certain sense the purchase of the most common and trivial article involves the exercise of judgment and discretion, as to cost, at least. But it will hardly be claimed that the common council could not authorize one of its attendants to buy a broom to sweep the council chamber, or its clerk to purchase necessary stationery for the use of its members. To question such authority would be to deny, as was said by COWEN, J., in *Bank agt. Norton* (1 *Hill*, 505), "that the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask." No question is made by the defendant as to the furni-

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ture procured being necessary. None as to its being suitable and well made. None as to its costs or its value. But it is claimed that it was to be included in the rent. A sufficient answer to that position is, that when the common council voted to rent the rooms of the plaintiff's agents at \$400 a year, they at the same time appointed a committee to arrange the rooms and procure the necessary furniture. That implies very clearly that the common council understood that they were to furnish the rooms at their own expense in addition to paying the rent. The committee was appointed, not to superintend the furnishing of the rooms, but to *procure* the furniture. What need of that action if it was to be procured by the lessors? In this view of the case the acceptance of the furnished rooms by the common council was a ratification of the action of the committee.

It is urged by the respondent's counsel that the common council had no authority to appoint upon the committee a person not a member of their body. The position is untenable.

It is also insisted that the committee did not meet, and all its members did not act, but confided the matter mainly to one of their members. The referee finds, on the contrary, that the committee met and requested the plaintiff to do the work. As the defendants do not appeal, they cannot question the sufficiency of the evidence to support the finding.

If the views above stated are correct, the plaintiff is not estopped from recovering by his action respecting the lease. The defendant's committee well knew that the furniture was provided by the plaintiff and not by his principals, and that it was to be paid for, aside from the rent of the rooms, and their knowledge on that subject is to be treated as the knowledge of their principal.

The judgment should be reversed and a new trial granted before another referee, costs to abide event.

TALCOTT, P. J., and HARDIN, J., concurred.

Ordered accordingly.

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U. S. CIRCUIT COURT.

MARGARET SULLIVAN agt. THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY.

*Complaint — Demurrer — What causes of action may and may not be joined
in the same complaint — Code of Civil Procedure, secs. 484-488.*

Where plaintiff sets up a claim against a railroad corporation for penalty incurred for excessive fare taken on one trip, and damages for personal injuries for unlawful ejection from defendant's cars on a subsequent trip, and defendant demurs to the complaint because, under section 484 of the New York Code of Civil Procedure, two causes of action have been improperly united:

Held, that, under section 488, a cause of action for penalty cannot be joined with a cause of action for personal injuries, even when they are claims arising out of the same transaction; and, at any rate, the claims in this action cannot be considered as arising out of the same transaction.

But section 484 should be construed to refer to cases of two or more good "causes of action" well pleaded, and the claim for a penalty in this case being insufficient in form and substance, the complaint contains but one cause of action, and that for personal injuries; and the demurrer should, therefore, be overruled, and the irrelevant matter in reference to the penalty should be stricken out.

Decided, July, 1881

J. T. Williams, for plaintiff.

William E. Barnett, for defendant.

BROWN, J. — This action was removed to this court from the supreme court of the state, and the sufficiency of the pleading is therefore to be determined according to the provisions of the New York Code of Procedure.

The complaint sets up a claim to fifty dollars as a penalty alleged to have been incurred by the defendant for demanding and receiving from the plaintiff an excessive fare beyond the rate of three cents per mile allowed by law, upon her trip

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from New Rochelle to Mt. Vernon on May 11, 1880; and also a claim to \$5,000 damages for being violently and unlawfully ejected from the defendant's cars upon her subsequent return trip, on the same day, to her great suffering and injury.

The defendant demurs to the complaint because it appears upon the face thereof that two causes of action have been improperly united, viz., one for a statutory penalty and the other for damages for personal injuries.

The New York Code of Procedure (*sec.* 488, *sub.* 7) allows a demurrer where the complaint contains different causes of action improperly united. Section 484 provides what causes of action may be joined in the same complaint. This action contains nine subdivisions, which are followed by a clause declaring that "it must appear that all the causes of action so united belong to one of the foregoing subdivisions." The second subdivision provides for "claims for personal injuries," and the ninth subdivision provides for "claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions."

The principal claim, which is for damages for personal injuries, is well pleaded and manifestly falls within the second subdivision of this section. By force of the concluding clause of this section above quoted, it follows that no other cause of action can be joined with that except one for personal injuries, since that forms the exclusive subject of subdivision 2. An action for a statutory penalty is not an action for a personal injury, and therefore cannot be joined with the other in the same complaint.

The defendant claims that by reason of a duplex or train ticket, so called, for five cents, having been given on the down trip, which was offered as part fare on the return trip, and which, as is claimed, contributed, through misunderstanding by the defendant, to her ejection on the latter trip, makes both claims fall within the ninth subdivision above stated as "claims arising out of the same transaction," &c. But that

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subdivision is further qualified by the amendment adding the words "and not included within one of the foregoing subdivisions." But the claim for personal injuries is included in subdivision 2, and hence cannot fall within subdivision 9, while the latter is the only subdivision under which a claim for a penalty can come, as none of the previous subdivisions would include it. But aside from this I think it impossible to consider a claim for a penalty incurred for excessive fare taken on one trip and an ejection for non-payment of fare on a subsequent trip to be "claims arising out of the same transaction." The penalty, if incurred, was complete before the latter trip began. I cannot perceive how the duplex ticket given on the first trip, even if refused on the second trip, would tend to make the excessive fare demanded on the first trip and the ejection on the second trip to constitute parts of the same transaction. They are perfectly distinct.

If there were no other circumstances in the case, therefore, the demurrer would have to be sustained.

But on examination of the complaint I am satisfied that it does not contain facts constituting a "cause of action" for a penalty. The design of a demurrer under section 488 is to compel the plaintiff to elect upon which of two causes of action improperly united he will proceed. No such election can properly be said to exist where but one good cause of action is set up. For if the other matter, which is insufficient to constitute a cause of action, could be supposed to be elected, a demurrer would immediately lie thereto, because it did not constitute a "cause of action," or the complaint could be dismissed therefor at the opening of the trial, and the result would be no action at all. Section 488 should therefore be construed to refer to cases of two or more good "causes of action" well pleaded. The words "cause of action" should be held to mean the same thing in subdivision 7 as in subdivision 8 of section 488.

The claim for a penalty is not presented as a distinct cause of action separately numbered, but is presented only as a part

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of an entire narrative. As a cause of action it is insufficient both in form and substance. It does not set forth, refer to, or in any manner identify the statute alleged to have been violated, nor even state whether it refers to a statute of the state of New York or to a statute of the state of Connecticut, under whose laws it alleges the defendant corporation was chartered. Again the necessary inference from all the allegations of the complaint on the subject of the excessive fare is that there was no such "demanding and receiving" of excessive fare as could be held to incur a penalty. The legal rate is alleged to be three cents per mile; the distance traveled three and nine-tenth miles, and the customary fare eight cents. The complaint shows that the plaintiff purchased no ticket before entering the cars, and that when thirteen cents was required of and paid by her the conductor gave her back a duplex ticket, which "he said was good for five cents." The plaintiff took it as such, and it nowhere appears that it was not good for five cents. The complaint goes on to state that the plaintiff, being old, and her eyesight poor, she "did not read what was printed on the ticket," &c. The necessary inference from this, coupled with the conductor's saying that the ticket was "good for five cents," is that the printed matter upon the ticket showed how and where the five cents was payable. If these conditions were reasonable, and such as the courts have upheld as justifiable regulations to enforce the purchase of tickets before entering the cars, then only eight cents were in effect demanded and received. The complaint does not state what the printed matter was, and it cannot be assumed that the directions for the redemption of the ticket were unreasonable, and it does not appear but that the plaintiff either has already received the money for it or may at any time do so. To incur a penalty there must be an intentional taking and appropriation of excessive fare. If counterfeit coin were given in making change, no action for penalty would lie; and in this case the ticket for five cents given back to the plaintiff shows that no excessive fare was designed to

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be appropriated by the defendant. Had the ticket not been good for five cents, or had the regulations or printed conditions been unreasonable, the plaintiff was bound to allege these facts.

The complaint contains, therefore, but one cause of action, and that for personal injuries, and the demurrer should, therefore, be overruled, with liberty to answer within twenty days, but under the circumstances, without costs, and the irrelevant matter in reference to the penalty should be stricken from the complaint.

SUPREME COURT.

WILLIAM M. KINGSLAND, respondent, agt. STEPHEN B. W. STOKES, as sole acting executor, &c., and others, appellants.

Pleading — Action by an executor, when an allegation of his appointment as such is unnecessary — Demurrer to complaint.

Where an action is brought upon an instrument executed by a person as executor and trustee under a last will and testament, an allegation that such person as executor of such last will and testament executed the instrument is sufficient, though where one sues as executor the rule is different, in which case he must aver his appointment and title as such, in particular. Or where the action is brought to recover a debt due to or from a testator, an allegation is necessary showing the appointment of the executor, or administrator, &c. such, with all necessary details to make that act apparent (*Affirming S. C.*, 58 *How.*, 1).

First Department, General Term, July, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL by the defendant Stokes from a judgment, entered upon demurrer and his omission to answer on leave which was given.

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S. B. M. Stokes, for appellants.

Frederick De P. Foster, for respondent.

BRADY, J. — This was an action to foreclose a mortgage. The amended complaint alleges that the defendant Stephen B. M. Stokes, as executor and trustee of and under the last will and testament of Elizabeth Borst, deceased, for the purpose of securing the payment to the plaintiff of the sum of \$30,000, with interest thereon, on or about the 1st day of September, 1875, executed and delivered to the said plaintiff a bond bearing date on that day, sealed with his seal, whereby he bound himself and his successors and assigns in the penalty of \$60,000, upon condition that the same should be void if the said defendant Stephen B. M. Stokes, as executor and trustee, as aforesaid, his successors or assigns, should pay to the said plaintiff, &c. The defendant Stokes demurred, on the ground that it appeared that the complaint on its face did not state facts sufficient to constitute a cause of action. In support of the demurrer, it was urged that several facts, which were necessary to establish the plaintiff's right to recover, were omitted from the statement of the cause of action; for example, that the complaint contained no allegation as to whether the mortgagor was in fact the executor of Elizabeth Borst, deceased, and no statement of the place, county or state, of any such appointment, or the functionary connected with it; and that, for aught that appeared, such alleged appointment might have been in a foreign state; and further, that there was no allegation in the complaint of the place, county or state, of the appointment of the defendant Borst as administrator with the will annexed, the said Stokes having been discharged as executor; and further, that there was no allegation in the complaint that the executor had power to execute the mortgage.

These various elements were disposed of in the opinion given by Mr. justice VAN VORST, before whom the demurrer

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was argued, and in a manner entirely satisfactory. The cases which were cited by the learned counsel were disposed of by the observation that they are applicable where one sues as an executor, in which case he must aver his appointment or title as such; or where the claim urged is one against a testator. In this case, the action is brought upon an instrument executed by a person as executor and trustee under a last will and testament. And this seems to be a sufficient statement of it as executor. If the defendant Stokes had no power, as executor or trustee, to execute the mortgage under the will named, that would be a good defense, and doubtless for the protection of the estate, it could be interposed for its benefit. But whether this be so or not, as decided in the case of *Holli-day agt. Fletcher* (2 *Ld. Raymond*, 10-15), suing one as administrator did, of necessity, imply that the administration was committed to him; or suing one as an executor and trustee of and under the last will and testament of a person named, implies that the proper letters were issued to him to enable him to assert the capacity stated.

The learned counsel for the respondent criticises the case of *Skelton agt. Scott* (18 *Hun*, 375), cited by Mr. justice VAN VORST in his opinion. An examination of that case leads to the conclusion that the criticism upon it is erroneous, and that it does decide exactly what it is accredited with having adjudicated, in the opinion of that justice. The complaint in that case alleged that the mortgage was given by one Israel O. Beatty, as executor of the last will and testament of John Scott, deceased. According to the report of the case it did not appear, although it is stated in the opinion, that the mortgagor gave back the mortgage for part of the purchase-money. The allegation in the complaint, therefore, according to the report, is just such an allegation or substantially such a one as made in this case, namely: that Israel O. Beatty, as executor of a last will and testament, executed the mortgage. As suggested by Mr. justice VAN VORST, where one sues as executor the rule is different, in which case he must aver his

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appointment and title as such in particular. Or where the action is brought to recover a debt due to or from a testator, an allegation is necessary, showing the appointment of the executor or administrator as such, with all the necessary details to make that fact apparent (*Sheldon* agt. *Hay*, 11 *How.*, 11; *Stephens' Pl.*, 288; *Rightmire* agt. *Raymond*, 12 *Wend. P.*, 51; *Morgan* agt. *Lyon*, 12 *Wend.*, 265; *Beach* agt. *King*, 17 *Wend.*, 197; *White* agt. *Joy*, 13 *N. Y.*, 83; *Forrest* agt. *Hayer*, 13 *Abb.*, 350; *Wheeler* agt. *Dakin*, 12 *How.*, 537).

The objection to the statement in regard to John Becker Borst, as administrator with the will annexed of Elizabeth Borst, is not of such a character as to make it necessary to interfere with the judgment pronounced. The statement appears in the prayer of the complaint, which is that John Becker Borst, having been previously named as one of the parties who had or claimed some interest or lien in the mortgage, and who had become administrator with the will annexed of Elizabeth Borst, deceased, be adjudged to pay any deficiency out of the estate in his hands which might remain applicable thereto after the sale of the premises. The demurrer to the prayer for relief cannot be maintained (*Mackey* agt. *Muer*, 8 *Hun*, 180). If the facts alleged are sufficient to afford any relief, the relief must be in harmony with the facts alleged.

For these reasons we think the judgment appealed from should be affirmed.

All concur.

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N. Y. COMMON PLEAS.

PAULINE HOPFENSACK agt. WILLIAM HOPFENSACK, ERNST HOPFENSACK, SUSANNAH D. HOPFENSACK and LOUIS W. HRABA.

Receiver's fees — to be paid out of the fund in his hands irrespective of the results of the litigation.

There is no question as to the right of the court to award to the receiver compensation out of the fund which he holds, even though the title to that fund be found to have been from the first and to be now in the defendants. The receiver's compensation cannot be made to depend upon the result of the litigation.

He is the officer of the court who takes property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party who shall ultimately be found to be entitled to it. Although it may sometimes happen, that by the unfounded claim of a plaintiff, the rightful owner of property is deprived temporarily of the possession of it, and that when he gets it back it is encumbered with the charges of the receiver to whom the court has given the care of it pending the litigation; yet great as may be the misfortune to the owner he must bear the loss unless he can obtain redress from the party on whose application the receiver was appointed.

Where the appellants were defendants charged with having property belonging to the co-partnership, to which they got no title because of the fraudulent character of the transfer to them, and the court by its receiver took the disputed property into its custody to abide the determination of the action, there being no other fund from which the receiver's legal fees and expenses are payable, he is entitled to them out of the fund in his hands, *i. e.*, the property in dispute, no matter to which of the parties to the action possession of such property has been adjudged.

General Term, November, 1880.

APPEAL by defendants Ernst Hopfensack and Louis W. Heaba from an order of the special term directing, among other things, that the appellants deliver to the receiver herein the property of which they dispossessed the receiver on the 11th

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day of September, 1879, and that the fees, allowances and dues of the receiver be paid out of such property.

Paulire Hopfensack, plaintiff, and William Hopfensack, one of the defendants, had been copartners. She claimed that he fraudulently conveyed the copartnership stock to the other two defendants, these appellants.

In this action for a dissolution and accounting, and for the appointment of a receiver, the appellants were joined as defendants in order to dispose of their title or claim to the property so conveyed. A receiver of that copartnership property was appointed *pendente lite* on plaintiff's motion; he took the property in dispute from these appellants at their place of business.

The appellants petitioned the court to be examined *pro interesse suo*, and to have the property restored.

They were so examined, but their application for restoration of the property was denied and the issues in the action were referred. The referee determined that the sale of the copartnership stock to the appellants was valid, and found on the other issues in favor of defendants, and judgment was accordingly entered.

Appellants thereupon again petitioned the court that the receiver deliver the property to them, and the court ordered a reference to pass the receiver's accounts. Appellants, pending the reference, took the property from the receiver's possession. After, the referee reported (on September 19, 1879) on the accounts of the receiver (allowing him \$353.23, commissions and expenses), the latter applied for an attachment against the appellants for their act in taking the property from his possession. As appellants denied that the property seized by the receiver was that of which he was appointed custodian, it was again referred to ascertain the facts.

The referee reported on February 18, 1880, that all the property taken by the receiver was the property which it was intended by said orders he should take possession of.

The plaintiff and the defendant, William Hopfensack, carried on for many years the business of manufacturing pocket-

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books and other leather goods, at 711 Broadway in the city of New York, under the firm name of Hopfensack & Co. On the 4th of January, 1879, while the plaintiff was attending to her sick husband at her residence in Eighty-fifth street, she learned that the defendant, William Hopfensack, who for several months prior thereto, had been in the sole possession and charge of the copartnership property, was about to transfer the same to his mother and brother. She thereupon went to the place of business, where she found that all the stock of manufactured and unmanufactured goods had been removed and transferred by the defendant, William Hopfensack, to the defendant, Susannah D. Hopfensack, his mother, and the fixtures and the rest of the property to Ernst Hopfensack, his brother. The defendant, Ernst Hopfensack, transferred the property to the defendant, Hraba, who was a working man employed by Hopfensack & Co., and who afterward pretended to carry on the business. But from the time of the transfer to his mother and brother up to the present, the defendant, William Hopfensack, remained in the possession of the business, and gave direction about the same as he had done while the business was carried on by the firm of Hopfensack & Co. An action was brought to dissolve the copartnership and for an accounting, and also to declare certain transfers of the copartnership property by said defendant, William Hopfensack, to the other defendants, his mother, his brother and their working man, to be fraudulent and void, and though it was brought in the name of the plaintiff, it was really brought for the benefit of the creditors. The plaintiff alleged that these transfers were the result of a conspiracy, and were made for the purpose of cheating her, as well as some of the creditors of the firm, and were therefore void. On the 13th day of May, 1879, by an order duly made and entered in said action, a receiver was appointed "of all the property and assets of the copartnership firm of Hopfensack & Co.," then "at 85 Nassau street, to which it had been removed from said 711 Broadway." The receiver

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duly qualified, and on the 26th day of May, 1879, entered into and took possession of all said property at 85 Nassau street. While in possession of said property as such receiver under said order, and on the 30th day of May, 1879, a copy of said order as resettled on May 29, 1879, by said court was duly served upon the receiver, which order was identical with the original order, except that the recitation in the original order "that the said property had been removed from No. 711 Broadway to No. 85 Nassau street" was omitted in the resettled order. Afterwards, and during the pendency of the action, such proceedings were had therein in said court, on the application of the defendants Ernst Hopfensack and Louis W. Hraba, that the receiver was required to show cause why the undertaking filed by him should not be increased and for other relief, and to show cause why the property in receiver's hands should not be delivered up to the defendants Ernst Hopfensack and Louis W. Hraba, upon which the court made an order of reference for the examination of Ernst and Louis touching their interest in the premises, and upon the coming in of the report of the referee, the court refused to grant said application, and refused to direct the increase of receiver's undertaking, and refused to order the delivery of any of said property to said Ernst and Louis, but did refer said case to Alfred Erbe, Esq., to hear and determine the issue in said action. On or about August 20, 1879, the referee filed his report wherein he found as a conclusion of law that the complaint in said action be dismissed on the merits, with costs, and directed judgment to be entered accordingly, which was duly entered. Afterwards, on the petition of Louis W. Hraba and Ernst Hopfensack, two of the defendants, an order was granted requiring the receiver on the twenty-fifth day of August to show cause why he, as such receiver, should not deliver over to the petitioners certain property claimed by them and in possession of said receiver, a motion being also pending on the part of the defendant that the receiver be discharged. It was ordered by the said court, by an order

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dated August 26, 1879, that Sidney J. Cowen be appointed referee to pass the accounts of the receiver and report such allowances for his fees, commissions and expenses, as in his opinion would be lawful and proper, and report the same to the court. That thereupon and on the twenty-sixth day of August, the attorney of the defendants noticed a hearing before the referee for August 28, 1879. The hearing was adjourned to September first, on which day it was progressed with and adjourned to September eighth, on which day it was further progressed and adjourned to September fifteenth. On the ninth day of September, on a motion in said action in said court, on the part of William Hopfensack, one of the said defendants, for an order directing the receiver to deliver to said defendant, William Hopfensack, certain of the said property in the possession of the receiver, it was by order of said court "ordered that the said motion be and the same hereby is denied, without prejudice, however, to said defendant renewing the same upon payment of costs allowed the plaintiff on an order in said action of May 13, 1879, appointing the receiver. During the 11th day of September, 1879, the defendant, William Hopfensack, broke into the premises wherein the property in the receiver's possession was kept, and took possession of the whole of said property except only the books of account and three promissory notes, which were still in the possession of the receiver. The receiver went to the premises and demanded of Louis W. Hraba and William Hopfensack, possession of the same, which was refused. On the 11th day of September, 1879, Louis W. Hraba and William Hopfensack, without leave of the court, commenced an action in the superior court by the service of a summons and complaint against the receiver individually for trespass, in taking possession of the property he had seized as receiver, laying their damages at \$6,000. The receiver applied to the court to restrain this action and to attach the defendants for contempt. On the hearing of this motion on the nineteenth day of September, the following opinion was rendered :

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N. Y. COMMON PLEAS.

PAULINE HOPFENSACK agt. WILLIAM HOPFENSACK *et al.**Special Term, September 19, 1879.*

J. F. DALY, *J.*— The receiver took possession of stock at 85 Nassau street, claiming that it was assets of the copartnership of which he was appointed receiver. The defendants Ernst Hopfensack and Louis W. Hraba claim the stock as their private property. They were joined as defendants (although not members of the copartnership, to obtain a dissolution of which this action was brought) and charged with conspiring with William Hopfensack to make away with the property of the copartnership.

The title to the stock seized by the receiver has not been determined in any proceedings. The two defendants claiming it, made a motion to have the receiver restore it to them, and upon such application this court ordered a reference to pass the receiver's accounts and ascertain the commission due him. The referee reported that merchandise, fixtures, &c., to the value of \$1,443.79 had come to his hands, besides collections, notes and cash, in all \$2,031.18, and that he was entitled for commission and disbursements to \$353.23.

Whether the merchandise alluded to was the disputed stock does not appear. If it were, the question of title has yet to be determined before the commissions of the receiver can be ordered paid out of it. The title can be determined in the action brought by the claimants against the receiver for trespass in taking that property. Such action has, however, been brought without leave, and against the receiver personally. It must be stayed until by further order of this court, if it may be made on petition by granting leave to prosecute it. The action, it seems to me, can be brought only against the receiver in his official capacity. His act in taking the property was induced by his attempt honestly to perform his duties promptly and thoroughly.

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On the question of punishing William Hopfensack and Hraba for contempt in taking possession of the disputed property, it appears to have remained in the premises where Hraba carried on business, where it was originally found by the receiver. What damage has been sustained by the parties to the action by the alleged contempt, I cannot discover from the papers. A reference may be had to inquire into that fact, but the main question to determine will still be the title, it would be less vexatious and expensive to let this application for attachment stand over until that title is determined. As judgment in the action between the parties has been determined in favor of defendants, there remains merely a question of receiver's fees, and that depends on whether the property he took possession of belonged to the copartnership.

The motion to punish for contempt will therefore be denied without costs, with leave to renew when the action in the supreme court is determined.

But if plaintiffs in that action fail within five days to apply for leave to prosecute it, this motion may be renewed at the expiration of that time.

The referee, to pass the receiver's accounts, made his report September 17, 1879, finding a balance due the receiver of \$353.23.

An application was made to the court by the defendants, William Hopfensack, Ernst Hopfensack and Louis Hraba, for leave to sue the receiver, and the following order was entered on the 22d day of October, 1879:

"It is ordered that the application for leave to sue the receiver be and the same hereby is denied, without costs."

"And it is further ordered that the order of reference heretofore made in this action to Sidney J. Cowen, Esq., and his report thereon be and the same are hereby opened, and it be referred back to the said referee to determine and report who was the owner of the property claimed by petitioners at the time the receiver took possession of the same, and to report whether the receiver is entitled to fees and allowances, and, if

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so, to report what allowances and expenses, in his opinion, would be lawful and proper, and to report as to whether the said receiver should be discharged and his security exonerated, and to report to whom the property, which came to the hands of said receiver, should be delivered, and in whose possession the same now is, and when and in what manner and by whom the said receiver was dispossessed of the same. And it is further ordered that on the coming in of said report either party have such other or further relief in the premises as shall be just and equitable, and that either party may apply therefor on two days' notice."

On February 3, 1880, the referee filed his report by which he found as matters of fact :

That under the order of this court appointing him, dated May 13, 1879, the receiver took possession of property in question at 85 Nassau street, on the 26th day of May, 1879.

That after he took possession the order was resettled.

That on said reference before the undersigned, he was attended by the said receiver and his counsel, and the said defendants and their counsel, and while said reference was pending, on the 11th day of September, 1879, the defendants, Louis W. Hraha, William Hopfensack and Ernst Hopfensack, took forcible possession of all the property in the hands of said receiver (except the books of account of said firm of Hopfensack & Co., and three promissory notes, amounting in the aggregate to \$234) and have ever since continued in possession of said property against the protest of said receiver and in violation of the orders appointing him.

That the property of which the receiver took possession under the said orders, was the property which it was intended by said orders that he should take possession of, and that as between the parties to this reference the property in question, at the time the receiver took possession of the same, belonged to the copartnership firm of Hopfensack & Co., consisting of the plaintiff and defendant, William Hopfensack.

That the receiver was dispossessed of the said property on

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the 11th day of September, 1879, by the forcible and wrongful act of the defendants, Ernst Hopfensack, William Hopfensack and Louis W. Hraba.

And that between the receiver and the said defendants, the property in question was at the time he took possession of the same, the property of the copartnership firm of Hopfensack & Co., consisting of the plaintiff and the defendant, William Hopfensack. That the said receiver is entitled to fees and allowances, and that the allowances and expenses to which he is entitled and which are lawful and proper, are \$674.73.

On motion to confirm report the following opinion was rendered and order entered:

N. Y. COMMON PLEAS.

PAULINE HOPFENSACK agt. WILLIAM HOPFENSACK *et al.*

Special Term, March, 1880.

VAN HOESEN, *J.*—This is a motion to confirm the report of a referee appointed to inquire, among other things, as to whether the compensation of a receiver should be paid by the defendant who, it has been decided upon a trial of the issues in the action, are the sole and exclusive owners of property which was placed in the hands of the receiver under the supposition that the plaintiff was entitled to some interest in it.

I regret that the last order of reference was ever made, for it has entailed unnecessary expense upon the parties.

Pauline Hopfensack alleged that she was a partner of the defendant William Hopfensack, and that William, unlawfully excluding her from her rights as a partner, had sold, or made a pretended sale of the partnership property to Ernst Hopfensack and Louis W. Hraba. Upon these allegations a receiver was appointed of the property alleged by the plaintiff to belong to the firm. Upon the complaint it was competent for the court to appoint a receiver of all the property claimed

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by the plaintiff, even though a part of it might be in the possession of and be claimed by Ernst Hopfensack and Hraba, who never were partners of the plaintiff (*Parker agt. Browning*, 8 *Paige*, 390).

Ernst Hopfensack and Hraba were bound, under the order appointing a receiver, which was warranted by the allegations of the complaint, to surrender the property, even though it was their own, to the officer of the court. Their course then was to apply to the court for a hearing *pro interesse suo*, under which the court might order the property to be restored to them, or to apply for permission to sue the receiver, and thus obtain a decision as to their right to the property (*Van Santvoord's Equity Practice*, F. 376; 7 *Paige*, 513; 9 *Paige*, 372; 9 *How.*, 24; 7 *Paige*, 65).

Any statement that the right to property in the possession of a receiver can only be determined by an action, when a third person not a party to the action claims it, is erroneous.

The defendants Ernst Hopfensack and Hraba took the first course suggested, and made an application to be heard *pro interesse suo*. Their application was the best, and without the leave of the court, the only one that could be taken. After the examination had been had, I believing that the allegations of Pauline were probably true, and that the partnership had never been dissolved, thought the prudent course to be not to order the surrender of the property to the defendant, but to give them an opportunity for a speedy trial; and thereupon a reference was ordered. Upon the reference it was adjudged that Pauline had dissolved the firm by mutual consent with her partner William, who had assumed the payment of all the firm debts which exceeded the assets, and that she had no right whatever to the property in suit, and that the complaint must be dismissed. Until the judgment entered upon the report of the referee shall be reversed, any inquiry by any special term, or by any referee appointed by a special term, must be powerless to impair the force and effect of that judgment; I therefore refuse to con-

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firm so much of the report of Mr. Cowen as undertakes to decide that Ernst Hopfensack and Louis Hraba are not, and were not when this action was began, the exclusive and the rightful owners of the property which was taken by the receiver, and which they applied to the court to restore to them.

When judgment was entered on the report of the referee, it became the duty of the receiver, under the guidance of the court, to restore the property to the defendants Ernst and Louis.

When these defendants applied for the restoration of the property, the court ordered a reference to ascertain what compensation should be allowed to the receiver. The reference was held, and a report made by the referee, which seems to me to have been very fair and proper. When it was presented for confirmation, the court seemed to be under the impression that the receiver could not get his fees from the fund which he held, because it had been decided that it belonged to the defendants, and was not property of the partnership.

An order was thereupon made that the reference should be opened and that the referee to ascertain receiver's compensation should review the decision of the referee who had decided the issues, and if he chose so to do, overturn the judgment which had been entered. That, as I have already said, neither the referee nor the special term can do; and therefore I refuse to confirm the report of Mr. Cowen in the particular I have pointed out.

I think there is no question as to the right of the court to award to the receiver compensation out of the fund which he holds, even though the title to that fund be found to have been from the first, and to be now in the defendants. The receiver's compensation cannot be made to depend upon the result of the litigation. He is the officer of the court who takes property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party

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who shall ultimately be found to be entitled to it. It may sometimes happen, as it probably happened in this case, that by the unfounded claim of a plaintiff the rightful owner of property is deprived temporarily of the possession of it, and that when he gets it back it is encumbered with the charges of the officer to whom the court has given the care of it, *pendente lite*. But great as may be the misfortune to the owner, he must bear the loss unless he can obtain redress from the party on whose application the wrong has been accomplished.

The court is not to blame, nor is the receiver who obeys its order. The property in the hands of the receiver is the fund from which his fees must be paid. Now, as I have before said, the first report of Mr. Cowen, seems to me to have been fair, and it ought to be confirmed, and as it is before me with the second report I shall order its confirmation; the second report I shall refuse to confirm. It is in conflict with the judgment of the court and awards to the receiver a large sum for the services of his attorney and counsel which were not rendered for the benefit of the estate, and were of no value to the estate. The amount awarded seems to me to be out of proportion with the sum allowed, for those services that were really chargeable against the fund.

It appears that the defendants actually took by force from the possession of the receiver some of the property which the court had placed in his hands. This must be restored to the receiver, and it may then be applied for the payment of his fees. Let proceedings be taken to bring Ernst Hopfensack and Louis W. Hraba before the court to answer for their contempt and to compel them to restore the property to the receiver.

The application of the receiver to be discharged may then be renewed.

His accounts are not in dispute.

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At the special term of said court, held at the court-house, in and for said county, on the 13th day of February, 1880.

Present — Hon. GEORGE M. VAN HOESEN,
One of the Justices of said Court.

The motion coming on to be heard to confirm the report of Sidney J. Cowen, referee herein, filed February 6, 1880, and to compel the defendants, William Hopfensack, Ernst Hopfensack and Louis W. Hraba, to pay the receiver the amount due him as receiver in said action for his commissions, fees, expenses and disbursements as specified in said report.

To attach the said defendants, Ernst Hopfensack, William Hopfensack and Louis W. Hraba, for contempt of said court in forcibly taking and unlawfully continuing in possession of the property heretofore in the possession of said receiver; and for such other and further relief, or both, as shall be just and equitable.

And the said court after hearing George B. Ely, of counsel for the receiver, and Charles S. Spencer, Esq., of counsel for defendants, having taken time to consider the same, after consideration. Now, on this day of March, 1880, it is ordered and adjudged as follows:

First. That the report of Sidney J. Cowen, referee herein, filed September 18, 1879, be and the same hereby is in all things confirmed.

Second. That Ernst Hopfensack, William Hopfensack and Louis W. Hraba deliver to the receiver herein the property of which they dispossessed the said receiver on the 11th day of September, 1879, and that the fees, allowances and disbursements of said receiver specified in the report of Sidney J. Cowen, filed September 18, 1879, amounting to the sum of \$353.23, be paid out of the same.

Third. That the said defendants, Ernst Hopfensack, William Hopfensack and Louis W. Hraba, show cause before the said court, at a special term thereof to be held at the court house in said county on March 26, 1880, at ten o'clock in the

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forenoon of that day, or as soon thereafter as counsel can be heard, why they, the said Ernst Hopfensack, William Hopfensack and Louis W. Hraba, and each of them, should not be attached for contempt of this court for their acts in taking forcible possession of the property heretofore in possession of the receiver in this action.

And that service of a copy of this order on the said defendants Ernst Hopfensack, William Hopfensack and Louis W. Hraba, on or before March 22, 1880, shall be deemed sufficient service.

Fourth. That the report of Sidney J. Cowen, Esq., herein filed on the 6th day of February, 1880, be not confirmed, but the same is hereby overruled and finally rejected.

Fifth. That the receiver herein, upon the settlement of his fees, allowances and disbursements as such receiver, have leave to apply to said court to be discharged from his receivership and to have his security exonerated.

Sixth. That the defendants Ernst Hopfensack, William Hopfensack and Louis W. Hraba pay to the said receiver ten dollars costs of this motion.

From this order the defendants William Hopfensack, Ernst Hopfensack and Louis W. Hraba appealed.

Geo. B. Ely, of counsel, made and argued the following points:

I. The question is not in whom the ultimate right to the property shall be found; but is, did the receiver act in good faith, and did he take into his possession the property which the order appointing him required him to take. A receiver is never a guarantor that the party who procures his appointment will succeed in his action (*Corey* agt. *Long*, 43 *How.*, 492; *O'Mahony* agt. *Belmont*, 5 *Jones & Spencer*, 233).

II. Where a stranger complains that the receiver has taken property not intended by the order, he may apply for leave to sue the receiver, or may on petition be heard *pro interesse*

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suo. Properly a party to the action can only apply in the latter mode. Hraba and the Hopfensacks were all parties to the action — were served with process and answered. They did apply on petition to have the receiver restore to them the property in question. They were examined and heard upon that application and it was denied. The order refusing to direct the receiver to deliver the property was a judicial determination that the receiver rightfully held it. It is *res adjudicata* and a perfect justification and protection to the receiver.

III. The referee found as a fact that the property taken by the receiver was the property which his order of appointment required him to take. Defendants on their application to the court, under which the order of reference to pass the receiver's accounts was made, acted upon the theory that the receiver was rightfully in possession. The evidence shows that in point of fact the receiver had taken possession of the property his order required him to take. Any pretense that the property taken had not been part of the assets of the firm is unfounded.

IV. To dispossess the receiver is a contempt of court.

V. The order appealed from should be affirmed.

Christian G. Moritz and Charles S. Spencer, for defendants.

J. F. DALY, J. — The complaint alleged that the entire stock of goods, materials, fixtures and assets of the copartnership, were fraudulently made over to these appellants by William Hopfensack. When, therefore, the court appointed a receiver of all the property and assets of the copartnership, and directed him to take possession thereof, the property so alleged to be fraudulently conveyed was intended, and no other. That the property he actually took into his possession, was the property so conveyed by William Hopfensack, is found by the referee in his report of February 18, 1880.

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The subject of the receivership was the disputed assets held by these appellants under a claim of title from an alleged fraudulent vendor. It was to preserve this property until it was determined in the action to whom it belonged, that the court by its receiver took it into its own custody. Whichever party prevailed, the property or fund pays for its preservation or protection.

The appellants do not stand in the position of third parties whose property has been wrongfully seized by a receiver. In such case they would be entitled to have it restored without any charges whatever and to be indemnified. Nor do they stand in the position of parties from whom a receiver has taken not only property which is the subject of the receivership but also property which is not in dispute in the action. In such case the property last described would be restored to them as a matter of course.

But appellants were defendants charged with having property belonging to the copartnership of Hopfensack & Co., to which they got no title because of the fraudulent character of the transfer to them. The court took the disputed property into its custody to abide the determination of the action, and as there is no other fund from which the receiver's legal fees and expenses are payable, he is entitled to them out of the fund in his hands, *i. e.*, the property in dispute, no matter to which of the parties to the action possession of such property has been adjudged.

Appellants claim that as the judgment determined that they are entitled to the property and were the owners thereof when the action was brought, they should have it free of all the receiver's charges. But no authority in support of the proposition has been cited.

The rule is that receivers are entitled to their costs out of the estate as a matter of course (2 *Barb. Ch. Pr.*, 328). They are entitled to have paid *out of the fund*, although it belongs to incumbrancers, the costs of an adverse application made by a party to the cause against the receiver (*Conrad*

People *ex rel.* Gould agt. Commissioners of Excise.

agt. *Hannerer*, 9 *Beav.*, 3; *Attorney-General* agt. *Lewis*, 8 *Beav.*, 179).

As this point is the only one relied upon in this appeal, and no question is made of the amount allowed to the receiver nor of the facts as found by the referee and above referred to, the order must be affirmed.

DALY, C. J., and LARREMORE, J., concurred.

NOTE. — During the pendency of proceedings to punish the defendants William Hopfensack, Ernst Hopfensack and Louis W. Hraba, for contempt in taking the property out of the receiver's hands, they paid the amount found due the receiver by the last report of the referee, viz.: \$674.73, and the proceedings were discontinued. — [ED.]

SUPREME COURT.

PEOPLE *ex rel.* GOULD agt. COMMISSIONERS OF EXCISE.

Writ of prohibition — to what extent can be used — Code of Civil Procedure, section 2100 — Excise commissioners — revocation of license.

A writ of prohibition is a preventive remedy, not a corrective one. It can only be used to prevent the doing of an act about to be done, not as a remedy for acts already completed.

The judicial proceedings of excise commissioners terminates when the board pronounces its judgment revoking a license, and the taking possession of the license is a ministerial act, to which prohibition will not lie.

The provisions contained in section 2100 of the Code of Civil Procedure "that the tribunal proceeded against may be directed to amend or vacate proceedings theretofore taken in the matter, applies only to interlocutory or *mesne* proceedings prior to the final decision.

Special Term, August, 1881.

CULLEN, J. — A writ of prohibition is a preventive remedy, not a corrective one. It can only be used to prevent the doing of an act about to be done, not as a remedy for acts already completed (*United States* agt. *Hoffman*, 4 *Wallace*, 158; *High*

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on *Remedies*, 542). I do not think that section 2100 of the Code was intended to alter in this respect the common law rule. The provisions there contained — that the tribunal proceeded against may be directed to annul or vacate proceedings theretofore taken in the matter — applies only to interlocutory or *mesne* proceedings prior to the final decision. I think the respondent's contention is correct, that the judicial proceedings of the excise commissioners terminated when the board pronounced its judgment revoking the relator's license, and that the taking physical possession of the license is a ministerial act as to which prohibition will not lie. It thus appearing that the proceeding sought to be enjoined had been fully terminated prior to the issue of the alternative writ, the writ must be quashed and the relator left to such other remedy by *certiorari* or otherwise as he may be advised.

Motion to quash writ granted, with ten dollars costs.

N. Y. COMMON PLEAS.

In the Matter of the accounting of WILLIAM D. SHIPMAN, as assignee of DUNCAN, SHERMAN & Co.

Assignment by a firm of copartnership and individual estate — Rights of individual creditor where the individual estate of one partner is more than sufficient to pay his individual debts.

Where the members of a firm make an assignment, for the benefit of their creditors, of their individual and copartnership estate, and the individual estate of one of the copartners is more than sufficient to pay his individual indebtedness, the individual creditor has the right to claim his debt and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of the distribution.

General Term, May, 1881.

Before DALY, C. J., J. F. DALY and VAN BRUNT, JJ.

Matter of Shipman.

Francis L. Stetson, for appellant. .

James H. Fay, for respondent.

VAN BRUNT, *J.* — Mr. James H. Fay and Mr. Sidney P. Slater, as executors of the last will and testament of Edward E. Dunbar, deceased, held a bond made by William B. Duncan, a member of the firm of Duncan, Sherman & Co., which in December, 1877, was past due and unpaid.

This bond bore date on the 14th day of June, 1871, and was payable on the 14th day of June, 1872, and the amount secured to be paid was \$7,300 and the interest thereon. Such interest was paid up to the 14th day of June, 1878, and a part of the principal, leaving the sum of \$2,473.34 of principal due.

In 1875, the firm of Duncan, Sherman & Co. made an assignment, for the benefit of its creditors, of their individual and copartnership estate to William D. Shipman.

The individual estate of Wm. B. Duncan was more than sufficient to pay his individual indebtedness, and the assignment provided that the assignee should convert the assigned estate into cash, and after the payment of expenses, to pay and "distribute the residue of the proceeds to and among the creditors of the firm and to and among the creditors of the respective individuals constituting the firm, according to law in such case made and provided, so that each of said classes of creditors — to wit, the creditors of the said firm and the creditors of the individual members thereof — shall receive as such classes, and respectively, from that part of such proceeds of all and singular the assigned premises in which, by law, they are respectively, as classes and individuals, entitled to share their due and ratable proportion according to law."

On the 18th of December, 1878, the said executors presented their claims to the assignee, who refused to pay anything more than the principal due upon said bond.

Upon the coming in of the assignee's accounts, after the return of the citation, the court made a decree that the

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assignee should pay the principal and interest to the time of distribution, upon said bond, and from this portion of the decree or judgment this appeal is taken.

I am entirely unable to see upon what principle individual creditors of William B. Duncan can be deprived of their right to recover the whole amount of damage which they have sustained by reason of his breach of contract to pay his individual debts when due.

It is conceded that his individual estate is and was amply sufficient to meet the whole of his individual liabilities, and it is also conceded that he has placed that estate, by virtue of the assignment, out of the reach of his individual creditors, and they were prevented from collecting the same by the ordinary process of law; and it is claimed that the delay which has been caused by the act of Mr. William B. Duncan in making the assignment which he has done, shall operate to the benefit of the copartnership creditors and to the detriment of the individual creditors.

The cases which have been cited from England, and also those in the state of Massachusetts, and also in the federal courts of this state, seem to rest upon the peculiar provisions of the bankrupt laws in force and under consideration by the courts respectively which decided the cases cited. There is no provision of the law of the state of New York regulating this question; and by the terms of the assignment itself it would seem that the rights of individual creditors were recognized, and that the provision of the assignment seems to be that those individual creditors shall be satisfied in full before any portion of the individual estate shall be devoted to the payment of copartnership debts. All that the assignors have the right to transfer to their copartnership creditors of their individual property is the surplus that would be returned to them by the assignee after the payment of their individual debts, in case each of the partners had simply made a separate assignment of their individual estate for the benefit of their individual creditors.

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Now, I do not think it could be claimed for a moment that where an individual had made an assignment of his individual property for the payment of his individual debts, believing himself to be insolvent, and it subsequently turned out that his estate was entirely solvent, but what his creditors would have the right to collect interest up to the time of distribution, and that he could not claim that they should only be paid up to the time of the assignment and that the excess should be returned to him.

The right of the individual to apply by means of an assignment only such part of his individual estate to the payment of copartnership debts as may remain over after the payment of his individual debts, being a transfer of that which would be returned to him in case he had made an individual assignment only, seems to show that the individual creditor has the right to claim his debts and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of distribution. The injustice of any other rule, it seems to me, is clearly manifest. The rights of the individual creditor would be delayed, and he would necessarily have to contribute to the increase of the fund which was to go to pay the copartnership creditors. There does not seem to be any equity in any such rule, and it cannot prevail unless we are compelled so to hold by some definite and controlling authority on the subject.

It is urged by the counsel for the appellant that the case of *Ex parte Murray* (6 Paige, 204) is not an authority in point. An examination of that case shows that the principle involved in the illustration which I have heretofore made use of received the entire sanction of the court in that case.

It is claimed that the decision of that case is not an authority because there was no voluntary assignment, no contract between assignor and assignee, and no express trust; that there was no question between one class of creditors and another, but it was a question only between one trustee and another, for if the surplus had returned to the corporation it

Kunz agt. Bachman.

would have held it in trust for the creditors; and that is precisely the condition of affairs in case of a solvent individual estate and an insolvent copartnership estate.

The assignee of the individual estate holds it in trust for the individual creditors, and the only interest which he has in the individual estate is in the surplus after the complete satisfaction of the individual debts.

In other words, as I have above said, all that the assignee gets is that which would be returned to the individual assignor, if there were no copartnership creditors.

I am of the opinion, therefore, that the order appealed from directing the payment of the individual creditors in full, with interest to the time of distribution, was entirely correct, and the order must be affirmed, with costs.

All concur.

SUPREME COURT.

GEORGE PHILLIP KUNZ, plaintiff and respondent, agt. CHRISTIAN BACHMAN, individually, and as executor, &c., defendant and appellant.

Notice of pendency of action — Code of Civil Procedure, sec. 1670 — actions which are embraced within the provisions of this section.

Where the complaint, after reciting the necessary facts leading thereto, prays that the rights and interests of the respective parties in certain premises and appurtenances may be determined and adjudged, and that the premises may be sold and the proceeds divided, claiming on behalf of plaintiff and another, that they are entitled to one-sixth of the net rents and income of the premises; and where the answer denies that either is so entitled:

Held, that the action is one which is brought to recover a judgment affecting the title to and the use and possession of real property, and is therefore, embraced within the provisions of section 1670 of the Code.

First Department, General Term, July, 1881.

Before DAVIS, P. J., and BRADY, J.

Kunz agt. Bachman.

Herbert T. Ketcham, for appellant.

Benjamin Merritt, for respondent.

BRADY, J. — This action is brought against the defendants, Christian and Frederick Bachman, as tenants in common with the plaintiff and Philip Kunz, Jr., under the will of George Bachman, deceased, a copy of which is set out in the complaint. The complaint alleges that Bachman died seized of the premises devised by the will mentioned; that the plaintiff and others are entitled as tenants in common under the will of certain shares specified; that the defendant, Catharine Bachman, has an inchoate right of dower; and that Lillian Bachman has also an inchoate right of dower; that the defendant, Christian, has collected and kept the rent of the premises since the 31st of August, 1879, and has rendered no account thereof; that the plaintiff and Philip Kunz, Jr., are each entitled to one-sixth of the net rents and income of the premises received by the defendant, Christian, since the time mentioned, and of the value of the part occupied by the defendants or either of them; and prays for an accounting and examination of the respective rights of the parties in the premises and a sale thereof, under the direction of the court, and a distribution according to the rights as they may be declared.

The defendant thinks that the notice of *lis pendens* should be canceled, inasmuch as the complaint contains no allegation or prayer from which a judgment affecting any right in real estate can result.

Section 1670 of the Code provides that in an action brought to recover a judgment affecting the title to, or the possession, use or enjoyment of real property, the plaintiff may, when he files the complaint, or at any time afterwards before final judgment, file in the clerk's office of each county where the property is situated, a notice of the pendency of the action.

It has already been shown that the complaint, after reciting

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the necessary facts leading thereto, prays that the rights and interests of the respective parties in the premises and appurtenances may be determined and adjudged, and that the premises may be sold and the proceeds divided, claiming on behalf of the plaintiff and Philip Kunz, Jr., that they are each entitled to one-sixth of the net rents and income of the premises received by the defendant for the period stated in the complaint, and of the value of the part occupied by the defendants or either of them.

The answer denies that the plaintiff or Philip Kunz, Jr., is entitled to one-sixth of the net rents or income of the premises described, received by the defendant at any time, or to one-sixth of the part occupied by the defendant or any defendant.

On the pleadings there is no reason to doubt, therefore, and there is really no opportunity for contention on the subject, that the title to the premises, or some part thereof, devised by the testator, is in question. The plaintiff asserts a title to a part of it and to a share of the rents, issues and profits, to the extent of such part, and the defendant denies it; and consequently the action is one which is brought to recover a judgment affecting the title to and the use and possession of real property, and is therefore embraced within the provisions of section 1670. This seems to be so plain that it is not deemed necessary to consider it with reference to any adjudged cases.

The order should therefore be affirmed, with ten dollars costs and the disbursements of the appeal.

DAVIS, P. J., concurs.

Lockwood agt. Fox *et al.*

N. Y. COMMON PLEAS.

LEVI A. LOCKWOOD agt. ROSE FOX *et al.*

Referees' fees in foreclosure actions — how to be taxed.

The fees of referees in foreclosure actions must still be taxed under chapter 569 of the Laws of 1869, as amended by chapter 192 of the Laws of 1874, those enactments not having been superseded by the Code of Civil Procedure.

General Term, May, 1881.

Before DALY, C. J.; J. F. DALY and VAN HOESEN, JJ.

PER CURIAM. — This is an appeal from an order of the special term taxing referees' fees at fifty dollars. The action was brought to foreclose a mortgage, and was settled by the parties after advertisement and before the sale. It is apparent, from examination, that referees' fees must be taxed, under chapter 569 of the Laws of 1869, as amended by chapter 192 of the Laws of 1874, unless a change has been made by the provisions of the Code of Civil Procedure (*Schermerhorn* agt. *Prouty*, 80 *N. Y.*, 317). There was no direct repeal of the specified enactments by the repealing acts. The statute of 1869, being a local act, is, therefore, unaffected, by virtue of section 3308, Code of Civil Procedure, to which the attention of the learned justice in the court below could not have been directed. It reads as follows: "The last section (regulating fees of sheriff), except the limitation of amount contained in subdivision eleventh thereof, does not affect any special statutory provision remaining unrepealed after this title takes effect relating to the fees and expenses of the sheriff of the city and county of New York, or the sheriff of the county of Kings.

The fees of the referee should, therefore, have been taxed at ten dollars, the disbursements having been paid.

The order must be reversed, with ten dollars costs and disbursements.

D I G E S T

CONTAINING THE WHOLE OF

61 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 23 AND 24 HUN, AND 81 AND 82 N. Y. REPORTS.

Attention is called to the two additional headings "CODE OF PROCEDURE" and "CODE OF CIVIL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of both Codes.

ABATEMENT.

1. An action by a father to recover the damages occasioned by the seduction of his daughter is an action on the case in tort, and is abated by the death of the defendant, and cannot be revived against his executors or administrators. (*Holliday* agt. *Parker*, 23 *Hun*, 71.)
2. While, under the Code of Procedure (*secs. 46, 47, 58, Code of 1848; secs. 53, 54 and 65, Code of 1849*), an action could not be brought in the marine court of the city of New York against an executor or administrator as such, yet where, after the court had acquired jurisdiction of an action the defendant died, the action did not abate, but could be continued against his personal representatives. (*People ex rel. Eagan* agt. *Justices of Marine Court*, 81 *N. Y.*, 500.)
3. This rule is not changed by the Code of Civil Procedure, as, while a similar prohibition is contained therein (*sec. 316, sub. 3*), the provisions for continuing actions (*secs. 755, 756, 757*) are made applicable to the marine court (*sec. 5, chap. 449, Laws of 1876, as amended by sec. 5, chap. 318, Laws of 1877*), and the law stands as it did under the former Code. (*Id.*)
4. In an action to restrain defendant from entering upon certain lands and cutting timber, &c., a temporary injunction was granted; this was dissolved by stipulation on the termination of another suit determining the title to the land. After this, defendant died; on motion of his administratrix an order was granted requiring plaintiff to elect whether or not he would continue the action against her, and subsequently, upon her motion, the action was discontinued and judgment entered accordingly.
Held, that an order of reference to ascertain damages by reason of the injunction was improperly granted; that as the action abated upon the death of the defendant, and the cause of action did not survive, the court had no authority to direct a discontinuance. (*Johnson* agt. *Elwood*, 82 *N. Y.*, 362.)
5. It seems that the effect of the provision of the Code of Civil Procedure (*sec. 757, as amended by chap. 542, Laws of 1879*), requiring the court, on motion, to revive an action "in case of the death of a sole plaintiff or a sole defendant" where "the cause of action survives or continues," is to take away the discretion which the court previously had, either to grant leave or to put the party to his bill of revivor, and requires that the relief

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shall be granted on motion, making the motion a complete substitute for the bill. (*Coit agt. Campbell*, 82 N. Y., 509.)

6. But the provision does not compel the granting of the motion in all cases; it simply requires that, where the party has the right to a revivor or continuance, the relief shall be granted on motion. (*Id.*)
7. This right is to be determined according to the settled rules of equity, so far as established by precedent. (*Id.*)
8. It is a rule of equity thus established, that the discretion of the court to refuse to revive a suit on the ground of delay, is to be guided by the statute of limitations applicable to the subject-matter of the suit. (*Id.*)
9. *It seems*, also, that said provision of the Code is not limited to actions originally brought by a single plaintiff against a single defendant. (*Id.*)
10. Where all of several defendants but one have died, and the right of action has survived against him, he is a sole defendant within the meaning of the provision; and upon his death, the action may be revived against his representatives. (*Id.*)
11. It is, however, only to the case of a sole defendant that said provision applies, and the action can be continued under it only against the representatives or successors in interest of such sole defendant. (*Id.*)
12. This action was brought by plaintiff, as judgment creditor of a firm of which defendant C. was the surviving partner, to reach certain lands the legal title to which was in defendant P., but which it was alleged was held by him as trustees for the firm. P. died in May, and C. in June, 1874.

Letters testamentary were issued to their executors in June. A motion to revive the action against the executors of both and also of the partner who had died before the commencement of the action was made in 1879:

Held, that if the case fell within said provision of the Code the delay was insufficient to bar the right of plaintiff to revive; but that the case was not included within said provision; that the principal party defendant was P., and when he died, he was not the sole defendant, and as to him, the provision did not apply; that at most it only authorized a revivor against the representatives of C., which would be of no avail, as he was only a nominal defendant. (*Id.*)

13. Also, *held*, that the action could not be revived against P.'s executors, as it did not appear that he devised to them the lands in question, or that they had any interest therein; but, on the contrary, it appeared that P. conveyed before his death. (*Id.*)

ACKNOWLEDGMENT OF DEED.

1. An officer is not disqualified from taking an acknowledgment of a deed from his father to his wife by reason of his relationship to the parties. (*Rem. Paper Co. agt. O'Dougherty*, 81 N. Y., 474.)

ACCORD AND SATISFACTION.

1. When in an action brought upon a claim the plaintiff, as a part of his case, proves a payment under a resolution of a board of village trustees to the effect that the sum so paid shall be in full settlement of the whole claim, and the circumstances under which it was accepted, the defendant may rely upon the facts as constituting an

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accord and satisfaction, though it has not pleaded them in its answer as such. (*Looby* agt. *Village of West Troy*, 24 Hun, 78.)

AFFIDAVIT.

1. Where, in a partition suit, one of the parties in interest has in his possession a portion of the estate, and has been in the habit of collecting the rents, as he alleges, for the protection of the income from waste, a receiver of such property should not be appointed upon affidavit upon information and belief, that such party is of little or no responsibility. (*Darcin* agt. *Wells*, ante, 259.)

2. Where a paper, purporting to be an affidavit taken in a judicial proceeding, indicates the proceeding in which it is made, has a proper venue, is subscribed by the deponent, and has a *jurat* in the usual form, signed by an officer having due authority to administer an oath, the omission of the name of the deponent in the body of the instrument is not, as a general rule, a fatal defect, and the paper is effectual as an affidavit. (*People ex rel. Kenyon* agt. *Sutherland*, 81 N. Y., 1.)

3. The test of the legal sufficiency of the paper is, would an indictment for perjury lie against the person who signed and swore to it, if it was willfully false? An officer may receive and give credence to any paper upon which an indictment for perjury would lie and be maintained. (*Id.*)

4. *It seems*, however, that where the affidavit, to be effectual, must be made by one having and acting in a certain character, or personal capacity, the paper should state the name of the deponent, and that he has that character or capacity. (*Id.*)

AFFIDAVIT OF MERITS.

1. An affidavit of merits in which the defendant states that "he has a good and valid defense to the whole of the *plaintiff's claim as set forth in said complaint* upon the merits thereof," is defective and insufficient; it should state that the defendant "has a good and substantial defense on the merits in this cause."

An affidavit is also defective which fails to state that the counsel, whose advice is sworn to, is the counsel of the defendant in the action in which the affidavit is made. (*State Bank of Syracuse* agt. *Gill*, 23 Hun, 406.)

AGREEMENT

See SPECIFIC PERFORMANCE.

McIneres agt. *Hogan*, ante, 447.

ALIMONY.

1. Although from the provisions of the Code of Civil Procedure *it seems* that the husband may be committed to prison without notice, if he fails to pay the alimony awarded, provided that the court shall decide that sequestration or the giving of security would not result in getting the money for the wife, yet *it seems* the court will not imprison the husband for the non-payment of alimony without first giving him notice of the application for his commitment, when it has not adjudicated that it would be of no avail to make an order of sequestration, or for the giving of security. (*Isaacs* agt. *Isaacs*, ante, 369.)
2. It was the intention of the codifiers to change the law as it existed under the Revised Statutes, and to prohibit the commitment of the husband for the failure to pay alimony, until the court had become satisfied by proof that the money

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could not be collected either by sequestration or by requiring the husband to give security. (*Id.*)

3. The court may determine that it would be useless to order sequestration or security. When it so determines the husband may be committed without notice if he neglects to pay the alimony which he is ordered to pay. (*Id.*)

ALLOWANCES.

1. Where counsel have appeared and presented claims, in behalf of their clients, against funds in the hands of a receiver of an insolvent life insurance company, and the claims have been rejected, and the orders rejecting them have been reviewed and affirmed, upon appeals taken therefrom to the general term and court of appeals, and neither of the courts have ordered that costs of the proceedings or of the appeals should be paid to such claimants, the special term should not grant an application made to it by the counsel for the unsuccessful claimants for an order granting them allowances in the nature of costs. (*People agt. Security Life Ins. and Annuity Co.*, 23 Hun, 596.)

AMENDMENT.

See WILL.

Merriam agt. Wolcott, ante, 377.

1. In the original verified complaint in an action on an insurance policy and in the proofs of loss the plaintiff stated his loss at \$800. Upon the trial he was allowed, against the defendant's objection and exception, to amend his complaint so as to demand the amount named in the policy, viz., \$2,000: *Held*, no error. (*Maghan agt. Hartford Fire Ins. Co.*, 24 Hun, 58).
2. Upon the trial of an action for professional services alleged to

have been rendered by plaintiff as attorney in proceedings in the matter of B., a lunatic, brought against the administrators of B., it appeared that plaintiff made application to the court in the lifetime of B. for an order requiring the committee of his estate to pay plaintiff's claim, that an order was granted settling the amount of the claim and directing the committee to pay the same; from this order the committee appealed; the general term reversed the order, its decision being rendered January 22, 1875. B. died January 15, 1875. Plaintiff was thereupon nonsuited; from the judgment entered thereon he appealed. The general term thereafter on motion directed its order of reversal to be amended so as to bear date January 5, 1875, and also ordered the amended order to be inserted in the case on appeal. On appeal from said order, *held*, that the amendment, as to date, was proper; but that the direction to insert the amended order in the case was error; that the matter should go before the general term upon the return made to it by the court below. (*Carter agt. Beckwith*, 82 N. Y., 83.)

3. Upon the trial of an action upon a contract, defendant moved and was permitted, without objection, to amend his answer by setting up an over-payment upon the contract, and demanding judgment for the amount thereof. It was proved that said overpayment was made after the commencement of the action:

Held, that the defendant was entitled to judgment for the amount of such overpayment; that under the Code of Procedure (*sec. 150, sub. 1, which was in force at the time of the trial*), as it was a claim arising out of the contract upon which the action was brought, it was a proper counterclaim; that defendant might have been allowed to set it up by supplemental answer (*sec. 177*); that

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the amendment was in effect a supplemental answer, and gave the same right to judgment. (*Howard* agt. *Johnston*, 82 *N. Y.*, 271.)

APPEAL.

1. Where an appeal is taken by defendant, upon stipulation, from an order of the general term of the marine court, setting aside a verdict as against the weight of evidence

Held, that there being a controverted question of fact involved to go to the jury, judgment absolute must be given against the defendant. (*Webber* agt. *Truax*, *ante*, 34.)

2. The result of this appeal shows the danger of appealing from such an order. (*Id.*)

3. Where the undertaking and notice of appeal described the judgment appealed from as a judgment entered on March eleventh, when in fact the judgment was entered on March twelfth:

Held, that the respondent was not required to move to set aside the undertaking, but was entitled to disregard it and issue execution. (*Dinkel* agt. *Wehle*, *ante*, 159.)

4. In an action to restrain the recognition of a claim to an office, the defendants, upon plaintiff's default, on the case being called for trial, on notice, was granted an extra allowance:

Held, that the action was not one in which, under the Code, the court had power to grant an allowance; and that though the general notice of trial is sufficient notice for an application for an allowance upon a trial in cases where the law provides for an allowance, this being no case for an allowance, the order, though granted by default, is appealable. (*Voorhis* agt. *French*, *ante*, 161.)

5. An appeal to the court of appeals

does not lie from an order of the supreme court confirming the report of commissioners of estimate and assessment in proceedings to open streets in the city of New York. (*Matter of One Hundred and Thirty-eighth and other streets*, *ante*, 284.)

6. The report of the commissioners is final and conclusive as to the amount of awards for land taken and the assessments for benefit, but not as to the regularity or validity of the proceedings. (*Id.*)

7. Where the proceeding is wholly unauthorized by law, a motion may be made to vacate and set it aside. (*Id.*)

See PRACTICE.

Wheeler agt. *Millar*, *ante*, 396

8. No appeal lies from an order refusing to confirm the report of a referee appointed by an interlocutory judgment to take proof of certain facts and report the same to the court before which an action is being tried, to enable it to make and render a final judgment therein, when such refusal is based upon the insufficiency of the report, and is accompanied by an order requiring the referee to furnish more specific facts. (*Kent* agt. *Quicksilver Mining Co.*, 23 *Hun.*, 199.)

9. A party who appears and unsuccessfully opposes a motion for the confirmation of the report of a referee, appointed in pursuance of the statute to pass upon a claim against the estate of a deceased person, may appeal from the judgment entered thereon without first moving at a special term for a new trial upon a case and exceptions. (*Kellogg* agt. *Clark*, 23 *Hun.*, 393.)

10. This action was brought to recover a balance of \$639, alleged to have been found and agreed to be due plaintiff on a settlement and account stated between him and

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defendant on May 1, 1876, and for labor of plaintiff and son between that day and December 9, 1876. Defendant, in his answer, after denying many of the allegations of the complaint and alleging payments, expressly admitted an indebtedness of \$230.89 "over and above all payments, offsets and counter-claims." During the trial defendant asked to amend his answer by alleging therein a counter-claim for \$700. This application was denied on the ground that the facts offered to be proved would not constitute a counter-claim:

Held, that the amount in controversy was less than \$500 within the meaning of section 191 of the Code of Civil Procedure, and so the case was not appealable to this court; that if the counter-claim had been alleged in the answer and put in issue by a reply, the amount in controversy would have been sufficient to allow an appeal, but as the counter-claim was not so alleged, it was not in controversy; that it mattered not that the referee placed his refusal to allow the amendment upon an erroneous view of the law, if an error was committed, such error could be reviewed only like any other error committed on the trial, and the amount in controversy would have to be determined by the pleadings as they actually were. (*Wiley* agt. *Brigham*, 81 *N. Y.*, 13.)

11. Upon appeal from a judgment of special term, dismissing plaintiff's complaint, the general term reversed the judgment, directed that an "interlocutory judgment be entered upon the facts found by the court; that a referee be appointed to take and state the accounts of the respective parties, and that, upon the filing and confirmation of his report, a further and final judgment should be entered by the special term for the final disposition of the entire controversy between the parties."

Plaintiff appealed to this term from the order, and the order of special term entered in pursuance thereof; he gave no stipulation for judgment absolute in case of affirmance:

Held, that the order of general term was not a "final judgment" within the first subdivision of section 198 of the Code of Civil Procedure; nor was it an order which in effect determined the action and prevented a final judgment, or an order made upon or deciding an interlocutory application, or an order deciding a question of practice within the second subdivision of said section; that as there was no stipulation it was unnecessary to determine whether the order could be regarded as an order granting a new trial. Appeal therefore dismissed. (*Jones* agt. *Jones*, 81 *N. Y.*, 35.)

12. In the provision of the Code of Civil Procedure limiting appeals to this court (*sec. 191, sub. 3*) the amount demanded in the complaint is made controlling only in actions not founded on contract, because in actions *ex contractu* the facts alleged in the complaint may show that plaintiff, if successful, would not in law be entitled to so large a recovery; the distinction is not based upon the theory that in the latter class of actions plaintiff may recover more than he demands in his complaint. (*Van Gelder* agt. *Van Gelder*, 81 *N. Y.*, 128.)
13. In an action for money had and received plaintiff asked judgment for \$400 with interest from the day prior to that on which the action was commenced. The judgment was for defendant. On appeal to this court plaintiff claimed the facts proven entitled him to enterest from 1869:
Held, that the judgment was not reviewable in this court as the amount in controversy was less than \$500; that to authorize a recovery for a larger sum than that

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claimed an amendment of the complaint would have been required, and no such amendment was made or applied for. (*Id.*)

14. While on appeal from an order which expresses the grounds upon which it was put, but the exception is coupled with phrases which create a doubt, the opinion of the court may be referred to; where no ground appears in the order it cannot be qualified in its operation and effect by reference to the opinion. (*Fisher agt. Gould*, 81 N. Y., 228.)

15. After judgment has been entered upon an order overruling a demurrer without leave to plead to the merits, or with leave not availed of, the court, in the exercise of its discretion, will not, as a general rule, grant leave to withdraw the demurrer and to plead. (*Id.*)

16. An order refusing leave in such case is not reviewable here. (*Id.*)

17. Where, after the evidence of a witness as to a matter is excluded, the same witness is allowed to testify fully in reference thereto, this obviates the error, if any, in the prior ruling. (*In re Crosby agt. Day*, 81 N. Y., 242.)

18. A witness, in answer to a question as to what he said to defendant in reference to a certain transaction, answered that he told defendant "exactly what was done." Defendant's counsel moved to strike out the answer, on the ground that the witness should state what was said. The motion was denied and exception taken. The witness then proceeded to give a particular narration of what occurred between him and defendant:

Held, that the exception was untenable as the answer could not have prejudiced. (*Id.*)

19. Defendant D. executed to plaintiff an assignment under seal of

a bond and mortgage, which contained a guaranty of payment of the amount secured in case of the failure of the mortgagors to pay. In an action to foreclose the mortgage, D. was sought to be charged with any deficiency. He alleged and offered to prove that at the time of the execution of the assignment, plaintiff, in consideration of being permitted to retain \$300 out of the purchase-money and of the assignment to him of a policy of insurance upon a building on the premises, agreed by parol to keep the building insured until the mortgage became due; that she did not do this, and that the building was destroyed by fire. The evidence was objected to and excluded:

Held, error; also, that the fact that the breach of this parol agreement was not in terms set up as a counter-claim was not available here, as the facts were alleged, and no objection to the proof offered was made upon the ground that the pleading was defective. (*Van Brunt agt. Day*, 81 N. Y., 251.)

20. The pleadings in an action will not be amended on appeal to this court for the purpose of reversing a judgment. (*Volkening agt. De Graff*, 81 N. Y., 268.)

21. A proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action but a special proceeding. (*Roe agt. Boyle*, 81 N. Y., 305.)

22. An order of general term granting a new trial in such proceedings is not appealable to this court; it is not a final order, and in a special proceeding no appeal to this court is authorized except from a final order. (*Code of Civil Procedure*, sec. 190.) (*Id.*)

23. An order of general term, reversing a judgment, entered upon a decision of the court, stated that

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the reversal was "upon the law and the facts:"

Held, that it sufficiently appeared that the reversal was "upon a question of fact," within the meaning of the provisions of the Code of Civil Procedure (*sec.* 1338) authorizing a review of such a question by this court. (*Van Wyck* agt. *Watters*, 81 N. Y., 352.)

24. In an action upon a promissory note, where the defense was usury, *i. e.*, that the note was executed by defendant for the accommodation of the payee, and was transferred by him at a usurious rate of interest, there was no finding, or request to find, that the note was accommodation paper, upon which question the evidence was conflicting, but the referee found that it was duly made and delivered to the payee and by him duly indorsed to plaintiff before maturity; to these findings there were no exceptions:

Held, that this court had no right, for the purpose of reversing the judgment, to find that the note was not business paper; that, *prima facie*, the note was given for value, and the burden was upon defendant to prove the defect alleged. (*Bayliss* agt. *Cockcroft*, 81 N. Y., 363.)

25. Where, in an action upon an oral contract, the statute of frauds is not pleaded, and there is no objection to proof of the contract by oral testimony, or exception to any finding or conclusion which presents any question under that statute, no such question can be considered on appeal to this court. (*Bommer* agt. *Am. Spiral, etc., Co.*, 81 N. Y., 468.)

26. Where the statute of limitations is set up as a defense, but no point is made in respect to it on the trial, and no exception taken, raising any question under it, no such question can be considered here. (*Id.*)

27. Where, upon the trial of an ac-

tion to compel the cancellation of a deed alleged to have been forged, the issue of forgery was tried by all the parties upon the theory that it depended upon the question whether the signature to the deed was the genuine signature of the apparent grantor, and the referee found it was not executed by him and was not his deed, *held*, that it could not be claimed upon appeal that the grantor may have acknowledged the deed and so bound himself thereby; that the finding, interpreted with reference to the issue made, was equivalent to a finding that the deed was neither executed nor acknowledged by the grantor; and that the finding was conclusive here. (*Rem. Paper Co.* agt. *O'Dougherty*, 81 N. Y., 474.)

28. After judgment had been rendered against defendant, in an action in the marine court, and after an appeal from the judgment had been argued at the general term, but before decision, the defendant died: on motion of plaintiff the marine court granted an order continuing the action against the executor of the will of the deceased defendant, to whom letters testamentary had been issued. The general term, in the meantime, reversed the judgment and granted a new trial. On application of the executor the supreme court granted a writ of prohibition, restraining the marine court from entertaining further jurisdiction of the action:

Held, error; also, that the order affected and deprived plaintiff of a substantial legal right, and in effect determined the action, and so was reviewable here. (*People ex rel. Egan* agt. *Justices of Marine Court*, 81 N. Y., 500.)

29. Also, *held*, that even if the decision of the general term of the marine court was void under the Code of Civil Procedure (*sec.* 763), because rendered after the death of the defendant, the point was not available on appeal to this court,

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- from the order granting said writ. (*Id.*)
30. On the trial of an action the plaintiff is entitled to go to the jury on any theory consistent with the pleadings which his evidence will justify; before he can be limited to any certain theory, on appeal, it must appear in the case as settled that he has thus limited himself on the trial. (*Hazewell* agt. *Coursen*, 81 N. Y., 630.)
31. A surrogate has power, in proceedings to prove a contested will, after the testimony has been closed and the case submitted, to grant an order, on motion opening the case, to allow a witness to correct his testimony. (*Martinhoff* agt. *Martinhoff*, 81 N. Y., 641.)
32. The granting of the motion is in the discretion of the surrogate, and is not reviewable here. (*Id.*)
33. Where an order denying an application for an order of arrest or commitment does not show that it was not made upon the merits, it will be so presumed, and the order is not reviewable here. (*In re Townsend*, 81 N. Y., 644.)
34. The opinion below cannot be looked into, unless the language of the order is ambiguous and needs aid for an understanding of the ground on which it went. (*Id.*)
35. Judgment having been entered against defendant, upon an order overruling his demurrer to the complaint, he appealed to the general term. He subsequently moved at general term for leave to discontinue his appeal, to withdraw his demurrer and to answer, which motion was, by consent of counsel on both sides, there heard:
Held, that upon appeal from an order granting the application, the objection could not be raised that the motion to withdraw the demurrer and answer could not properly be made at general term.
- (*Vanderbilt* agt. *Schreyer*, 81 N. Y., 646.)
36. The supreme court has power to open defaults and to vacate judgments, and a judgment entered upon demurrer may be relieved against as well as any other. (*Id.*)
37. Whether the power shall be exercised in a case is a question in the discretion of that court, with the exercise of which this court will not ordinarily interfere; and while this power must not be exercised arbitrarily, so as to deprive a party of a valuable right, where facts exist showing that the ends of justice may require its exercise, the determination of the general term is not reviewable here. (*Id.*)
38. The proper remedy for erroneous allowance of counsel fees by surrogate on final accounting of executors is by appeal, not by motion to open decree and vacate allowance. (*See Marsh* agt. *Avery*, 81 N. Y., 29.)
39. Order granting new trial in action tried by jury, where facts were before general term, not appealable. (*See Whitson* agt. *David* [Mem.], 81 N. Y., 645.)
40. Service of copy order, before entry, not addressed to any one and without written notice of entry, not sufficient to limit time for appeal. (*See Sheridan* agt. *Andrews* [Mem.], 81 N. Y., 650.)
41. On appeal to this court from a judgment entered on a decision of the court or the report of a referee, no fact can be considered for the purpose of reversing the judgment unless it is either stated in the findings, or was requested to be found on uncontroverted evidence. (*Thomson* agt. *Bk. of British N. America*, 82 N. Y., 1.)
42. In an action of ejectment, it was claimed on appeal that a judgment for the entire mesne profits had

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been taken against two of the defendants without proof of possession by them, or either of them, of the entire premises:

Held, that as it did not appear by the record that the point was brought to the attention of the trial court it was not available here. (*Hynes* agt. *McDermott*, 82 N. Y., 41.)

43. Under the provision of the State Constitution (*art. 3, sec. 18*) prohibiting the construction of a street railroad without the consent of a specified portion of adjacent property owners, or in lieu thereof a determination of commissioners, appointed by the general term of the supreme court, that such railroad ought to be constructed, and a confirmation thereof by the court, the determination of commissioners is inoperative until so confirmed. The general term has not a mere formal function; and, while the proceeding before it is in the nature of an appeal, it has original jurisdiction so far that it has the power and it is its duty to review the whole case and to pass upon the sufficiency of the facts to warrant the determination, and it is within the discretion of said courts whether or not to confirm the commissioners' report. (*In re Kings Co. El. R. R. Co.*, 82 N. Y., 95.)

44. The exercise of this discretion is not reviewable here. (*Id.*)

45. This action was brought to recover back two items of money alleged to have been extorted from plaintiff without consideration and wrongfully; the defenses were a denial of the wrongful acts charged and averments that one of the items was paid for services rendered by a bank of which defendant was president, and that the payment was to said bank and not to defendant; as to the other item that it was a charitable donation to a church of which defendant was treasurer, and that both

were paid voluntarily; evidence was given on the trial supporting the defense as to both items. Upon appeal from an order of general term reversing a judgment in favor of plaintiff, entered on the verdict of a jury and granting a new trial, *held*, that, assuming the payments were made without consideration, and though voluntarily made could be recovered back (as to which *quære*), yet if the defendant was not guilty of the wrongs charged, and as to one of the items simply acted as agent of his bank in receiving the money, and the payment was in fact to the bank and went to its use (which facts it was conceded by appellant's counsel were to be assumed in favor of respondent), defendant was not personally liable for that item, but the action should have been against the bank; that at least as to so much of the recovery it was erroneous, and being wrong in part a new trial was proper. Appeal, therefore, dismissed. (*Am. Nat. Bk.* agt. *Wheelock*, 82 N. Y., 118.)

46. Upon motion in an action of foreclosure by a junior mortgagor to be subrogated to the rights of the plaintiff upon payment of his mortgage, it was a question at issue, as to whether the junior mortgage was paid:

Held, that the determination of the court below was conclusive upon appeal. (*Thomby* agt. *Cassidy*, 82 N. Y., 155.)

47. The order directed the discontinuance of the action, without costs, as against plaintiff:

Held, that this was in the discretion of the court, at least that plaintiff was not in a position to raise the question. (*Id.*)

48. An order of the supreme court punishing an attorney for professional misconduct, not committed in the presence of the court, but based upon evidence, is reviewable

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- upon the facts in this court. (*In re Eldridge*, 82 N. Y., 161.)
49. The decision of the general term herein was filed nearly two years, and the appeal to this court was taken more than one year ago. The respondents' counsel requested, in case the court reached a conclusion different from that of the general term, that it would suspend its decision, to give opportunity to apply to that court for an order showing that the reversal was upon the facts as well as the law. It did not appear that the reversal was upon the facts:
- Held*, that the request could not be granted; that it would not be proper to allow a new decision to be made by the court below to defeat the appeal; and that if the reversal was upon the facts, the respondents should have taken proceedings before the argument and submission of the case to procure an amendment of the order of general term. (*Hamlin* agt. *Sears*, 82 N. Y., 327.)
50. An appeal lies to the general term from an order of the special term, directing judgment for plaintiff on account of the frivolousness of defendant's answer, before the entry of judgment in pursuance thereof. (*Elwood* agt. *Roof*, 82 N. Y., 428.)
51. But an order of general term reversing the special term order is not appealable to this court; it is in the discretion of the court below whether to pass upon the sufficiency of the answer, on motion, or to put the plaintiff to a regular demurrer. (*Id.*)
52. The supreme court has discretionary power to grant or withhold a common law *certiorari*, and the exercise of this discretion cannot be reviewed here. (*People ex rel. Waldman* agt. *Bd. Police Comr's*, 82 N. Y., 506.)
53. This action was commenced in 1866 to foreclose a mortgage executed by defendant G.; C. was made codefendant upon the ground that he had guaranteed payment of the mortgage, and judgment was demanded in the complaint against both defendants for any deficiency. C. died on January 9, 1870, and in June of that year judgment was entered *nunc pro tunc* as of January sixth, charging G. only with any deficiency. In November, 1877, there was a sale under the judgment and a large deficiency. Plaintiff died in December, 1878; in December, 1879, his executor moved that the judgment be amended *nunc pro tunc* so as to provide that C. should be liable for any deficiency. The motion was granted by the special term, but on appeal to the general term the order was reversed:
- Held*, that conceding the special term had power to make the order, it was not bound to exercise it, but it was a matter of discretion; that the exercise of this discretion was reviewable by the general term but not by this court; also, that the denial of the relief under the circumstances was no abuse of its discretion by the general term. (*Grant* agt. *Griswold*, 82 N. Y., 569.)
54. An application to exonerate a sheriff as official bail, made after the time for answering in an action to charge him as such has expired, is in the discretion of the court below. (*Douglass* agt. *Haberstro*, 82 N. Y., 572.)
55. The exercise of this discretion by a special term of the supreme court may be reviewed by the general term, but the determination of the latter court is not reviewable here. (*Id.*)
56. The court of appeals will not decide mere abstract questions from the determination of which no practical result can follow.

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(*People ex rel. Geer* agt. *Com. Council Troy*, 82 *N. Y.*, 575.)

57. Where, therefore, on appeal from an order denying an application for a *mandamus* to compel the common council of a city to appoint certain officers, it appeared that the official term over which the controversy arose had already expired:

Held, that the appeal should be dismissed. (*Id.*)

58. An order of arrest is a provisional remedy which the court may grant or refuse in a proper case within its discretion, and the exercise of this discretion is not reviewable here. (*Clarke* agt. *Lourie*, 82 *N. Y.*, 580.)

59. No appeal lies, therefore, in this court, from an order vacating an order of arrest, when upon any view of the facts the decision can be upheld. (*Id.*)

60. Unless the contrary appears in the order, it must be assumed that it was made in the exercise of such discretion. (*Id.*)

61. The opinion of the court below cannot be resorted to for the purpose of determining the ground on which it was based. (*Id.*)

62. An order of general term reversing an order of special term, vacating an assessment, without ordering a rehearing, is a final order appealable to this court. (*In re N. Y. P. E. Pub. School*, 82 *N. Y.*, 606.)

63. An order of reference, to take proof as to charges made by creditors against an assignee for the benefit of creditors, is not reviewable here, as it is an order, not final, made in a special proceeding (*Code of Civil Procedure*, sec. 190, sub. 3). (*In re Friedman*, 82 *N. Y.*, 609.)

ARBITRATION.

1. The refusal of an arbitrator to hear testimony, which is pertinent and material, is sufficient misconduct to authorize the setting aside of his award, although he may think he has sufficient other evidence. (*Halstead* agt. *Seaman*, 82 *N. Y.*, 27.)

2. The construction by arbitrators of the submission to them is not conclusive; it is for the court to determine whether they have exceeded their powers or refused to exercise them. (*Id.*)

3. The general rule that their decisions are not reviewable on the mere ground that they are erroneous applies only to their decisions on matters submitted to them. (*Id.*)

4. A submission by the parties hereto to arbitrators in the usual form contained this clause; "The arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man."

Held, that this did not justify a decision of the arbitrators that the submission limited them to passing upon the statements of the parties only. (*Id.*)

5. The statements presented by the parties were conflicting; plaintiff insisted upon calling witnesses in his behalf to disprove defendant's statements, and named two witnesses whom he offered to produce. A majority of the arbitrators refused him permission and refused to receive any evidence other than the statements, basing their refusal upon the ground that under the submission their powers were limited to the statements:

Held, that it was not necessary for plaintiff, in order to preserve his rights, to produce or name his witnesses, or to state what facts he intended to prove by them;

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and that the refusal was misconduct which vitiated the award. (*Id.*)

ARRESTS.

1. Under the old Code a warrant must be issued in the first instance in every case, to authorize the judgment allowing an execution against the person. (*Glacius* agt. *Molditz*, ante, 62.)
2. As section 16 of the old Code is still unrepealed and operative, the only change made by the Code of Civil Procedure being that every action must be begun by summons and the substitution of orders of arrest for warrants of arrest, it would seem that the practice would be the same under the law as it now stands. (*Id.*)
3. A foreign judgment does not prevent an arrest in this state, in an action relating to the same cause of action, if such cause of action be one in which the defendant was liable to be arrested under the Code. (*Baxter* agt. *Drake*, ante, 365.)
4. Section 552 of the Code of Civil Procedure was intended to, and did, settle the rule as to the effect of a judgment in the court of another state, and as to the right to an order of arrest, and confers an absolute right to sue for the original cause of action; and within the provisions of this section, the action may be maintained upon the judgment and an order of arrest be granted upon proof that a proper cause of action originally existed. (*Id.*)
5. In an action brought upon a promissory note, an order for the arrest of the defendant may be granted where it is shown that he has, subsequently to the making of the note, disposed of his property with intent to defraud his creditors, although such fraudulent acts are not set forth in the

complaint. (*Duncan* agt. *Guest*, 24 *Hun*, 639.)

6. Where judgment in an action has been perfected against the defendant and he has been charged in execution, a provisional order of arrest issued thereon is extinguished, and is thereafter of no force or validity; it is not revived by a reversal of the judgment. (*People ex rel. Roberts* agt. *Bowce*, 81 *N. Y.*, 43.)
7. Accordingly held, that upon such reversal the relators, who were held in confinement under the execution, could not be held under the order of arrest, but were entitled to their discharge. (*Id.*)
8. As to whether a new order of arrest may be obtained, *quære*. (*Id.*)
9. An order of arrest was granted on affidavits showing that certain personal property belonging to plaintiff had been intrusted to defendant S., upon her agreement that she and the other defendant would sell it for the plaintiff and account to him for the proceeds, instead of which they had secreted and taken it away. On motion to vacate the order it appeared that after the property had gone into the possession of S., plaintiff accepted from her a confession or judgment; the statement upon which it was entered declared that the property was "sold and delivered" to her, and that for its value she was indebted to plaintiff. After the facts alleged to show conversion were known to plaintiff he issued an execution upon said judgment and collected a part thereof. Plaintiff in opposition alleged that the judgment was taken as security merely:
Held, that the judgment was conclusive against plaintiff upon this question; that by accepting and enforcing it by execution he must be deemed to have made his election to treat the property as

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that of S., under a sale from him, and that he could not now change his ground; and that, therefore, a refusal to vacate the order was error. (*Fields* agt. *Bland*, 81 N. Y., 239.)

10. Where an order denying an application for an order of arrest or commitment does not show that it was not made upon the merits, it will be so presumed, and the order is not reviewable here. (*In re Townsend*, 81 N. Y., 644.)
11. An order of arrest is a provisional remedy which the court may grant or refuse in a proper case within its discretion, and the exercise of this discretion is not reviewable here. (*Clarke* agt. *Lourie*, 82 N. Y., 580.)
12. No appeal lies, therefore, to this court, from an order vacating an order of arrest, when upon any view of the facts the decision can be upheld. (*Id.*)
13. Unless the contrary appears in the order, it must be assumed that it was made in the exercise of such discretion. (*Id.*)

ASSESSMENTS.

See NEW YORK (CITY OF).

Matter of Rector, &c., of the Church of the Holy Sepulchre, ante, 315.

ASSIGNMENT.

1. Where, upon the face of an assignment, or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors it affords no protection to the assignee against a sheriff who seeks to enforce, by execution, a judgment against the debtor. (*McConnell* agt. *Sherwood*, ante, 67.)
2. Where, in the assignment after describing the property, the assignor declares the conveyance to be in trust: *First*. To sell and dispose of his personal property and estate, and "collect the notes, accounts and choses in action, and the taking the part of the whole when the party of the second part" (the assignee) "shall deem it expedient to do so;" and, *Second*. Prescribes the distribution and payment of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or, if insufficient for that purpose, "in proportion to their respective demands," but further declares that the assignee "may have the right to compromise with" those creditors if in his opinion "it would be advantageous" to them and to the assignor:
Held, that the first provision does not taint the assignment.
Held, further, that to the clause permitting the assignee to compromise with the creditors of the assignor must be applied the rule which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds and therefore void.
Held, also, that applying this rule, the assignment was void upon its face (*Affirming S. C.*, 58 *How.*, 543). (*Id.*)
3. The insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm, is evidence of fraudulent intent on the part of the assignors so as to void such assignment. (*Schiele* agt. *Healy*, ante, 73.)
4. The prior right of the creditors of the firm to its effect cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right and hinders or delays such creditor in enforcing payment of his

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demand against the firm from the firm's property, is a violation of the statute and a fraud upon such creditor. (*Id.*)

5. Where upon a composition under the general assignment act, the creditors have agreed to take the notes of the assignors for a percentage of the amount of their respective claims, and when after payment of the expenses, all the property assigned, or the proceeds of it, is restored to the assignors, the five per cent commission upon the value of the estate allowed by law to the assignee is to be estimated upon the aggregate amount of the composition, with the expenses incurred and paid out by the assignee added to it. (*Matter of Hulbert, ante, 98.*)

6. In allowing compensation to the attorney of the assignee the court will not go beyond the \$2,000 allowed in the cases provided by sections 3252 and 3253 of the Code of Civil Procedure, unless the nature of the attorney's services is specifically detailed, in order that their value may clearly appear. (*Id.*)

7. The right of a creditor to an accounting by the assignee cannot be divested by the mere fact of a composition in bankruptcy, unless that right was in some way relinquished by the creditors, or shall be divested by the order of the court in bankruptcy, as when a composition has been made and accepted, and the terms of the composition have been complied with, the bankruptcy court will order the property in the hands of the assignee in bankruptcy to be surrendered to the bankrupt. (*Matter of Straus & Co., ante, 243.*)

8. If a composition under the bankrupt law has been duly ratified, it confines the creditor to his security and discharges the debtor from liability. But the creditor

can pursue any collateral remedies for the collection of his debt. (*Id.*)

9. Where it did not appear whether the proposition for a composition embraced as a part of it that the security which the creditors already held by and under the assignment to P. should be relinquished, and did not appear whether the petitioning creditors, in proving their debts, made any deductions from their face or account of any security they had by virtue of the assignment to P., and especially it did not appear whether the bankrupt court, in approving of the composition, took into consideration the amount realized from the assigned property, or estimated that as a part of thirty per cent, which was to be paid by the composition, and was agreed to be accepted in satisfaction, or whether the proposition for a composition provided that the security to which the creditors were equitably entitled under the assignment should be relinquished, and as it does not appear that the bankrupt court has authorized P. to deliver back the assigned property to the assignors:

Held, that it was error in the county court to refuse the application of the petitioning creditors for an accounting of the assignee, and releasing him from his liability to account to his *cestui que trust*, and authorizing him to deliver back to the assignors the assigned estate. (*Id.*)

10. Where the members of a firm make an assignment, for the benefit of their creditors, of their individual and copartnership estate, and the individual estate of one of the copartners is more than sufficient to pay his individual indebtedness, the individual creditor has the right to claim his debt and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of the distri-

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bution. (*Matter of Shipman, ante*, 515.)

11. Since the passage of chapter 466 of 1877, a general assignment for the benefit of creditors must, in order to vest the property in the assignee, be in a writing duly acknowledged by the assignor, must have thereon the assent of the assignee, duly subscribed and acknowledged by him, and must have been duly recorded.

An assignment recorded without the assent of the assignee to act, having been duly subscribed and acknowledged by him thereon, although he may have orally agreed to act, is void as against creditors claiming under attachments against the property of the assignor. (*Rennie agt. Bean*, 24 *Hun*, 123.)

ATTACHMENT.

1. Where a motion was made by A., founded upon her judgment and execution, to vacate the attachment on the ground of the insufficiency of the proofs upon which it was granted, which was denied on the ground that the judgment was irregular, and that she did not acquire a lien upon the attached property, and, therefore, could not make the motion, A. then made a new motion to vacate the same attachment, alleging that she had a deed of the attached real estate, made upon the same day her judgment was rendered, and that when she made the former motion she supposed her judgment was a lien upon the land. She had previously applied to the special term for leave to renew the former motion, for the same reason, and leave was refused:

Held, that the present motion not being founded upon her right as lienor, to move to vacate the attachment, but upon her right as grantee under a deed, was not in the nature of an application to review the question decided on

the first motion and the decision on that motion, that she was not a lienor under her judgment and execution, was in no way inconsistent with a new motion founded upon her ownership of the land attached. (*Steuben County Bank agt. Alberger, ante*, 227.)

2. The fact that she might, on the first motion, have proceeded on this ground also, did not preclude her from resorting to an independent motion to vacate, after the first motion was denied. (*Id.*)
3. The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision of the former motion, cannot apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion. The decision of the former motion is no bar to this motion. (*Id.*)
4. The doctrine of *res adjudicata* does not apply with the same strictness to decisions on motions as to judgments:
Held, that the order of the general and special term should be reversed, and an order entered vacating the attachment as against the land embraced in the deed (*Modifying decision in same case*, 78 *N. Y.*, 252). (*Id.*)
5. Where the plaintiffs in an action against two defendants, who were copartners, obtained a warrant of attachment against the property of one copartner only, and another firm of subsequent attaching creditors in another action against the same defendants, applied for and obtained an order of special term vacating such warrant of attachment on the ground that it appeared on the argument of the motion to vacate, that the warrant of attachment was issued against the property of one defendant

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only, on the ground that he had absconded; also, that the firm against whom the action was brought was insolvent and unable to pay their debts in full:

Held, the attachment cannot be discharged merely because no lien on the firm property had been thereby acquired; plaintiffs are allowed to retain their attachment in such case for whatever it is worth.

Held, also, that neither the cases of *Donnell* agt. *Williams* (21 *Hun*, 218); and *Staats* agt. *Bristow* (73 *N. Y.*, 264), supports the point "that in an action against a firm consisting of two members, if a warrant of attachment be granted against one upon a debt due by the firm, and the firm is insolvent, the interest of the party proceeded against is nothing and no lien is thereby acquired." (*Buckingham* agt. *Swezey*, *ante*, 266.)

6. *Donnell* agt. *Williams* explained, and *Staats* agt. *Bristow*, distinguished. (*Id.*)

7. Choses in action in the hands of an assignee for the benefit of creditors cannot be levied upon under an attachment issued in an action brought against the assignor by one of his creditors, even though the assignment was made to defraud the assignor's creditors. (*Smith* agt. *Longmire*, 24 *Hun*, 257.)

8. Wages due to a debtor for services rendered within a period not exceeding the sixty days prior to the levy of an attachment, which are necessary for the support of his family, are not the subject of levy under such attachment. (*McCullough* agt. *Carragan*, 24 *Hun*, 157.)

9. In an action against a national bank organized in another state, an attachment may be issued against the property of the defend-

ant in this state. (*Robinson* agt. *Nat. Bk. of Newberne*, 81 *N. Y.*, 385.)

10. The provision of the national banking act (*U. S. R. S.*, sec. 5242) prohibiting the issuing of an attachment, injunction or execution against such an association or its property before final judgment, applies only to an association which has become insolvent or to one about to become so, as specified in the preceding part of the section. (*Id.*)

11. A mere levy under an execution upon property which has been attached is not such an "actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action," within the meaning of section 682 of the Code of Civil Procedure, as will bar a subsequent lienor of the right to move to vacate the attachment. The section means an actual and real application as distinguished from a constructive one. (*Woodmansee* agt. *Rogers*, 82 *N. Y.*, 88.)

12. In an action upon an undertaking, given to discharge an attachment, conditioned to pay any judgment recovered by the attachment creditor, it appeared that the attachment debtor, within four months after the issuing of the attachment, filed his petition and was thereupon adjudicated a bankrupt and made an assignment; he then applied to the bankruptcy court to stay proceedings in the action in which the attachment was issued; this was denied, and judgment was recovered:

Held, that the proceeding in bankruptcy was no defense, as there was at the time no attachment, lien or attachment in force upon which the proceeding could operate; and that neither the letter nor the policy of the bankrupt act was infringed by holding the defendants liable. (*McCombs* agt. *Allen*, 82 *N. Y.*, 114.)

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ATTORNEYS.

1. The defendants, acting as the attorneys for one Halsey and others, recovered a judgment for \$27,976 13, in an action brought against the Pennsylvania and Susquehanna Bay Railroad, and issued an execution thereon to the plaintiff, the sheriff of Tompkins county, under which he levied upon certain personal property of the railroad, sufficient in amount, with the real estate owned by it, to satisfy the execution. Thereafter, and before the property had been sold, the sheriff received a letter from the plaintiffs in the execution, stating that the difficulty between the railroad and their firm had been satisfactorily settled, and that "the judgment and all of our claims against them have been paid and satisfied in full; so, of course, you will proceed no further in the sale of the R. R. Co. as advertised." In fact the judgment had not been paid, but had been assigned to one Cook, who agreed to pay the sheriff's fees.

Cook having failed to pay the fees, the sheriff brought this action against the defendants to recover them:

Held, that he was entitled to recover. (*Van Kirk* agt. *Sedgwick*, 23 *Hun*, 37.)

2. In the absence of a special agreement imposing a personal liability an attorney for one of the parties to an action cannot be held personally responsible for the services of a stenographer therein. (*Bonyng* agt. *Field*, 81 *N. Y.*, 159.)
3. An order of the supreme court punishing an attorney for professional misconduct, not committed in the presence of the court, but based upon evidence, is reviewable upon the facts in this court. (*In re Eldridge*, 82 *N. Y.*, 161.)
4. The distinction between such a case and proceedings for a contempt occurring in the presence of the court, and where the facts are certified by the court pointed out. (*Id.*)
5. Where the alleged misconduct is denied, the affidavits and papers upon which the proceedings were instituted are not evidence upon the issues, but simply perform the office of pleadings or statements of the charges relied upon. Affidavits are sufficient to originate the proceedings, but upon the trial of the issues the common law rules of evidence must be observed. (*Id.*)
6. An assignment of the property of a debtor, in trust for creditors, executed in the name of the debtor and duly acknowledged by an attorney duly constituted for that purpose is valid under the act of 1860 (*chap. 340 of the Laws of 1860*), and effectual to vest in the assignee the title to the assigned property. (*Lowenstein* agt. *Flaunaud*, 82 *N. Y.*, 494.)

ATTORNEY AND CLIENT.

1. In 1866, Messrs. Pond & French, as attorneys for S. S. Stoddard, commenced an action against one Whiting, in which they were defeated at the circuit, but were successful in the court of appeals, a judgment in favor of the plaintiff being entered on May 16, 1872. Pending the appeal taken by him to the general term, and on September 16, 1869, the plaintiff assigned his right of action to the defendant in this action subject to the payment of all costs and counsel fees of every name and nature, due to the said Pond & French, and to all costs which he then was or might become liable to pay to Whiting, which were assumed by the defendant.

In this action, brought by the assignee of Messrs. Pond & French, to recover for their services rendered in the action against Whiting, *held*, that their claim for serv-

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ices was entire, and that the statute of limitations did not begin to run against it until the final termination of the action in 1872. (*Gustine* agt. *Stoddard*, 23 *Hun*, 99.)

2. That they were entitled to recover for the services rendered before, as well as for those rendered after the assignment to the defendant. (*Id.*)
3. Where upon the return of an order requiring an attorney to show cause why he should not be punished, as for a contempt, because of his failure to pay over to his client moneys collected for him, a reference is ordered, the court may, upon the coming in of the report, appoint a day for the hearing thereon, and direct that an attachment issue against the attorney, returnable upon the day of the hearing for the purpose of securing his presence thereon. (*Matter of Steinert*, 24 *Hun*, 246.)
4. The court may direct the hearing to be had within a shorter period than that prescribed by General Rule No. 30. (*Id.*)
5. The fact that the attorney has evaded the service of the attachment and other papers, and neglected to appear on the return day, will not authorize the court to refuse to entertain a motion made by his counsel to set aside the order directing the attachment to issue, on the ground of alleged irregularities in the proceedings. (*Id.*)

ATTORNEY'S LIEN.

1. The plaintiff, having recovered judgment in an action brought by him against defendant Curry, and having been beaten in another action against Curry, with judgment against him for costs, brought this action to compel a set-off of one judgment against the other, the first with interest, being large enough to extinguish the second;

and Curry's attorneys thereupon interposing their lien:

Held, that the statutes regulating set-offs, under which it has been decided that in an action like the present the lien of attorneys must yield to the right of set-off, having been repealed, section 66 of the Code may be invoked by the attorneys to uphold their lien. (*Ennis* agt. *Curry*, *ante*, 1.)

BAIL.

1. Under section 191 of the Code of Procedure, exoneration of bail by the legal discharge of the principal from the obligation to render himself amenable to process within twenty days after the commencement of an action against them was a matter of right, but after that time it was a matter in the discretion of the court. (*Mills* agt. *Hildreth*, 81 *N. Y.*, 91.)
2. Accordingly, *held*, that an order denying a motion on the part of bail, made more than twenty days after the commencement of a suit upon the bail bond, was not reviewable here; it not appearing that the order was made upon any ground concerning which the court was not called upon to exercise its discretion. (*Id.*)
3. An application to exonerate a sheriff as official bail, made after the time for answering in an action to charge him as such has expired, is in the discretion of the court below. (*Douglass* agt. *Haberstro*, 82 *N. Y.*, 572.)

4. The exercise of this discretion by a special term of the supreme court may be reviewed by the general term, but the determination of the latter court is not reviewable here. (*Id.*)

BANKRUPTCY.

1. The right of a creditor to an accounting by the assignee cannot

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be divested by the mere fact of a composition in bankruptcy, unless that right was in some way relinquished by the creditors, or shall be divested by the order of the court in bankruptcy, as when a composition has been made and accepted, and the terms of the composition have been complied with, the bankruptcy court will order the property in the hands of the assignee in bankruptcy to be surrendered to the bankrupt. (*Matter of Straus & Co.*, ante, 243.)

2. If a composition under the bankrupt law has been duly ratified, it confines the creditor to his security and discharges the debtor from liability. But the creditor can pursue any collateral remedies for the collection of his debt. (*Id.*)

3. Where it did not appear whether the proposition for a composition embraced as a part of it that the security which the creditors already held by and under the assignment to P. should be relinquished, and did not appear whether the petitioning creditors, in proving their debts, made any deductions from their face on account of any security they had by virtue of the assignment to P., and especially it did not appear whether the bankrupt court, in approving of the composition, took into consideration the amount realized from the assigned property, or estimated that as a part of thirty *per cent*, which was to be paid by the composition, and was agreed to be accepted in satisfaction, or whether the proposition for a composition provided that the security to which the creditors were equitably entitled under the assignment should be relinquished, and it does not appear that the bankrupt court has authorized P. to deliver back the assigned property to the assignors:

Held, that it was error in the county court to refuse the application of the petitioning creditors

for an accounting of the assignee, and releasing him from his liability to account to his *cestui que trust*, and authorizing him to deliver back to the assignors the assigned estate. (*Id.*)

4. A debt due from a factor for goods sold by him on commission is a debt created in a "fiduciary character," within the meaning of the bankrupt act of 1867, and is not cut off by a discharge in bankruptcy. (*Hardenbrook et al. agt. Colson*, ante, 426.)

5. The plaintiff having incurred certain liabilities for the defendant's benefit, the latter executed a bill of sale and chattel mortgage of certain personal property to him to secure him against loss therefrom. Thereafter, the defendant having failed to pay the indebtedness for which plaintiff was liable, the plaintiff brought this action to recover the possession of the property covered by the bill of sale and mortgage. The sheriff having been unable to find the whole of the property, the plaintiff procured an order of arrest, under section 179 of the Code of Procedure, upon the ground that the defendant had concealed, removed or disposed of the property with the intent that it should not be found or seized by the sheriff. The plaintiff thereafter recovered a judgment and collected a portion thereof under an execution issued thereon, but never obtained the possession of that portion of the property in respect to which the order of arrest was made.

Upon a motion made by the defendant, under section 1268 of the Code of Civil Procedure, to have the judgment canceled on the ground of his subsequent discharge in bankruptcy:

Held, that the debt upon which the judgment was recovered was not created "by the fraud" of the defendant within the meaning of that term, as used in section

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5117 of the United States Revised Statutes, exempting debts so created from the effect of a discharge in bankruptcy, and that the motion should be granted. (*Bergen agt. Patterson*, 24 *Hun*, 250.)

BILL OF LADING.

1. Where a bill of lading contains a clause that in case the consignees of a cargo shall discharge the same they shall charge the master not to exceed ten cents per ton, and have four full working days to discharge the same after notice of the arrival of the boat at their dock, and to pay the master for any time the boat is detained for discharging, after the expiration of said four days, five dollars per day, and at the same rate for portions of a day:

Held, that the consignees had an election, upon the arrival of the boat, whether they would themselves unload the cargo or require the master to unload it. Primarily it was the duty of the master to unload the cargo. (*McLaughlin agt. Albany and Rensselaer Iron and Steel Co.*, ante, 439.)

2. Where in such a case the consignees upon the arrival of the boat offered the master dock room, though without special facilities for speedy and economical unloading, and notified him that they would not unload the cargo except he would wait his regular turn, and would not pay him demurrage:

Held, that this was notice to the master that the consignees elected not to unload the cargo except in its regular turn, and that the master, after such notification, having seen fit to wait his turn was not entitled to recover demurrage. (*Id.*)

BILLS, NOTES, CHECKS AND DRAFTS.

1. Southwick, Thayer & Co., of Memphis, Tennessee, were the ac-

ceptors of a draft dated March thirteenth, and drawn to the order of J. N. Merriam & Son, of Boston, which the latter had indorsed and negotiated to Francis P. Merriam, who held it at maturity, and sent it to Memphis for collection. The acceptors being unable to pay this draft, were authorized by the payees (J. N. M. & Son), by a telegram sent from Boston to Memphis, to draw on the latter for the amount necessary to take up the old draft. (*Southwick agt. First National Bank*, ante, 164.)

2. S. T. & Co., on May sixth, drew as authorized, and instead of using the draft to take up the old one, applied it to the payment of an antecedent debt due by them to the defendants — a bank in Memphis — the latter having no notice of the telegram, or of the object or purpose of the draft of May sixth, and being ignorant of the misapplication. The defendants sent the draft to Boston for collection, where it was accepted and paid by J. N. M. & Son, in ignorance of its misapplication, and the defendants (before they were informed of the diversion) credited the proceeds on the debt due them by S. T. & Co.:

Held, 1. That although the defendants could not have enforced the draft against the acceptors, because they (the defendants) had not paid a new consideration for it, yet, having collected it, and applied the proceeds in payment of a debt (although an antecedent one), they could retain the money.

2. That although J. N. M. & Son accepted and paid the draft of May sixth in ignorance of the diversion and of the fact that the proceeds would not be applied to take up the draft of March thirteenth, yet this was not a payment "under a mistake of fact," within the rule that money so paid can be recovered; the mistake being as to an "extrinsic" and not an "intrinsic" fact.

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3. That the defendants, in collecting the diverted draft, were not guilty of a conversion of it (*Comstock agt. Hier*, 73 N. Y., 269, distinguished).

4. That even if J. N. M. & Son could recover from the defendants the money paid by the former on the diverted draft, yet the action would not lie without a previous demand and refusal; and that the letter of J. N. M. & Son, mentioned in the opinion of the court, did not amount to a demand, and the answer of the defendants (also quoted in the opinion) did not amount to a refusal. (*Id.*)

3. Plaintiff sued as the assignee of the rights of J. N. M. & Son (the acceptors and payers of the diverted draft), and also as the assignee of the rights of F. P. M., the owner of the draft of March thirteenth, for the payment of which the draft of May sixth was authorized to be drawn, and was paid. The complaint alleged that the defendants received the draft of May sixth upon a promise to collect it and apply its proceeds in payment of the draft of March thirteenth, then held by F. P. M.; that is to say, the action was upon the rights of the plaintiff as assignee of the holders of the latter draft. No such promise, either express or implied, was proved, but the plaintiff was allowed to recover upon the rights of J. N. M. & Son, the acceptors and payers of the diverted draft of May sixth; the plaintiff having set forth in the complaint the assignment to himself of the rights both of J. N. M. & Son and of F. P. M.:

Held, that the complaint must be taken to set forth only one cause of action — to wit, the alleged promise of the defendants to apply the proceeds of the draft of May sixth in payment of the draft of March thirteenth, and that it was a fatal variance and error to allow the plaintiff to recover the money paid by J. N. M. & Son on the diverted draft.

Held, that the fact that the defendants were not "surprised" at the trial did not justify a recovery upon a cause of action not declared on (*Southwick agt. First National Bank of Memphis*, 20 Hun, 349, reversed). (*Id.*)

4. Where a check deposited by plaintiffs with defendant for collection was sent by defendant to a bank which was its collecting agent, the latter bank charging the check to the drawer's account, and crediting defendant with the amount in pursuance of an arrangement made between the two banks, the checks being returned to the drawer, a third party, as a voucher, and the collecting bank then failed and passed into the hands of a receiver:

Held, that such charging and crediting constituted a payment of the check to defendant, rendering it liable for the amount of the check to plaintiff. (*Briggs et al. agt. Central National Bank*, ante, 250.)

BURDEN OF PROOF.

1. In an action upon a promissory note, where the defense was usury, *i. e.*, that the note was executed by defendant for the accommodation of the payee and was transferred by him at a usurious rate of interest, there was no finding, or request to find, that the note was accommodation paper, upon which question the evidence was conflicting; but the referee found that it was duly made and delivered to the payee and by him duly indorsed to plaintiff before maturity; to these findings there were no exceptions:

Held, that this court had no right, for the purpose of reversing the judgment, to find that the note was not business paper; that, *prima facie*, the note was given for value, and the burden was upon defendant to prove the defect alleged. (*Bayliss agt. Cockcroft*, 81 N. Y., 363.)

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2. When, at the time of an agreement for a loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute; to increase or alter it, a special agreement is necessary, and where the defense of usury is interposed, the burden of showing that such an agreement was made is upon the defendant. (*Guggenheimer* agt. *Geiszler*, 81 N. Y., 293.)

CASE.

1. A case on appeal from a decision at circuit should be a transcript of the proceedings upon the trial; the general term has no power to direct such an alteration of the record as will cause it to state untruly the events of the trial. (*Carter* agt. *Beckwith*, 82 N. Y., 83.)

CATHOLIC PROTECTORY.

See VAGRANT CHILDREN.

People ex rel. Lopardo agt. *Catholic Protectory*, ante, 445.

CERTIORARI.

1. On September 8, 1879, the relator applied for a writ of *certiorari* to review the proceedings by which he was removed from his position as a member of the police force of the city of New York, which proceedings were completed and terminated on December 24, 1878:

Held, that in the absence of any excuse for his omission to sooner apply for the writ his application was properly dismissed, because it was not made with reasonable diligence. (*People ex rel. Stevens* agt. *Police Commissioners*, 24 Hun, 284.)

2. No notice of the granting of a writ of *certiorari* to review an assessment of real or personal property, under chapter 269 of 1880,

need be given if the court in its discretion sees fit to dispense with it. The writ must require a return to be made thereto at special term, to be held within not less than ten days from the time of its allowance, but it is not necessary that the writ should be served ten days before the return day. A writ issued upon the application of one assessed for real estate only, may require a return as to assessments of both real and personal property. The hearing upon the return to a writ of *certiorari* issued under the said act, should be heard at special term. The return to a writ issued thereunder is not conclusive, but is open to contradiction, and the court may appoint a referee to take and report the evidence to be produced by the parties. (*People ex rel. U. and D. R. R. Co.* agt. *Smith*, 24 Hun, 66.)

3. Defendant, in December, 1878, issued its warrant to the collector of the town of F. for the collection of the annual tax levied on the town, which included items for the payment of an installment of principal and interest on bonds of the town issued to pay for a highway improvement. On January 6, 1879, an order was granted for defendant to show cause why a writ of *certiorari* should not issue, and on February 4, 1879, the writ was issued and judgment entered directing that the said items be stricken from the tax-roll and the warrant amended accordingly:

Held, error; that the jurisdiction of defendant and its power to amend the roll terminated with the levy of the tax and the delivery of the roll and warrant to the proper officer; that neither the roll nor the warrant was before the court and the directions in the judgment were wholly unavailing. (*People ex rel. Weeks* agt. *Suprs. Queens Co.*, 82 N. Y., 275.)

4. Where a subordinate tribunal had jurisdiction, and there was evi-

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dence legitimately tending to support its decision, and no rule of law was violated, the decision cannot be reviewed upon a common law *certiorari*. (*People ex. rel. Hart agt. Bd. Fire Com'rs*, 82 N. Y., 358.)

5. The supreme court has discretionary power to grant or withhold a common law *certiorari*, and the exercise of this discretion cannot be reviewed here. (*People ex. rel. Waldman agt. Bd. Police Com'rs*, 82 N. Y., 506.)
6. Unreasonable delay in applying for the writ is a good ground for quashing it after hearing on a return thereto. (*Id.*)
7. The provisions of the Code of Civil Procedure regulating appeals to this court in such cases (*sec.* 190, *subds.* 2, 3), does not differ in meaning from that of the Code of Procedure (*sec.* 11). (*Id.*)

CODE OF PROCEDURE.

1. Sections 53, 54-64 — While, under the Code of Procedure (*secs.* 46, 47, 58 of *Code of 1848*; *secs.* 53, 54 and 65, *Code of 1849*), an action could not be brought in the marine court in the city of New York against an executor or administrator as such, yet, where after the court had acquired jurisdiction of an action the defendant died, the action did not abate, but could be continued against his personal representatives. (*People ex. rel. agt. Justices of Marine Court*, 81 N. Y., 500.)
2. Section 94 — As amended by chapter 431 of 1876, statute of limitations — when it operates prospectively only. (*See Carpenter agt. Shimer*, 24 Hun, 464.)
3. Section 101 — A statute of limitations, unless it contains some provision saving prior contracts from its operation, applies to them

as well as to those made after its passage.

The amendment of 1870 (*sec.* 5, *chap.* 741, *Laws of 1870*) to the provision of the Code of Procedure (*sec.* 101) excusing from bringing actions within the times limited because of certain disabilities, which struck out married women from the list of those disabled and removed the disability as to them, took away the extension of the time of limitation that theretofore had existed in their favor, and left the sections of the Code (*secs.* 89, 90), providing a period of limitation, operative upon them as well as others. (*Acker agt. Acker et al.*, 81 N. Y., 143.)

4. Section 135 — On an application for an order directing the service of the summons by publication, in an action commenced in July, 1877, an affidavit was presented which alleged "that the defendant has not resided within the state of New York since March, 1877."

Held, that this allegation was sufficient evidence of the plaintiff's inability, after due diligence, to find the defendant within the state, and was sufficient to confer jurisdiction upon the court to make the order. (*Carleton agt. Carleton*, 23 Hun, 251.)

5. Section 135 — Under the provision of this section of the Code of Procedure which authorized the service of a summons by publication, when it should appear by affidavit, "to the satisfaction of the court, or a judge thereof," that the defendant could not, after due diligence, be found within the State, the court or judge was empowered to pass upon the sufficiency of the evidence as to the exercise of due diligence. (*Belmont agt. Cornen et al.*, 82 N. Y., 256.)
6. Sections 150-177 — Upon the trial of the action defendant moved and was permitted, without objec-

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tion, to amend his answer by setting up an overpayment and demanding judgment for the amount thereof. It was proved that said overpayment was made after the commencement of the action:

Held, that defendant was entitled to judgment for the amount of such overpayment; that under the Code of Procedure (*sec. 150, sub. 1, which was in force at the time of the trial*), as it was a claim arising out of the contract upon which the action was brought, it was a proper counter-claim; that defendant might have been allowed to set it up by supplemental answer (*sec. 177*); and that the amendment was in effect a supplemental answer, and gave the same right to judgment. (*Howard agt. Johnston, 82 N. Y., 271.*)

7. Section 165—The provision of the Code (*Code of Pro., 165; Code of Civil Pro., 535*) authorizing proof of mitigating circumstances, notwithstanding defendant has pleaded or attempted to prove a justification, was intended simply to change the rule of pleading and not the effect or admissibility of evidence further than the change in the form of pleading did so. (*Hatfield agt. Lasher, 81 N. Y., 246.*)

8. Section 191—Under this section of the Code of Procedure, exoneration of bail by the legal discharge of the principal from the obligation to render himself amenable to process within twenty days after the commencement of an action against them was a matter of right, but after that time it was a matter in the discretion of the court. (*Mills agt. Hildreth, 81 N. Y., 91.*)

9. Sections 279-282—The "judgment book" required to be kept by every clerk of a court of record (*Code of Procedure, sec. 279; Code of Civil Procedure, sec. 1236*) is a separate and distinct book from

the "docket book," also required to be kept (*2 R. S., 360, sec. 13; Code of Procedure, sec. 282; Code of Civil Procedure, sec. 1245*); and an entry of such a judgment in the "judgment book" is not sufficient; unless entered in the "docket book" it is not docketed within the meaning of the statute. (*Sheridan agt. Linden et al., 81 N. Y., 182.*)

10. Section 399—Where the holder of a promissory note parts with the possession thereof to the maker, it is a personal transaction between them, within the meaning of this section of the Code of Procedure. (*Van Gelder agt. Van Gelder, 81 N. Y., 625.*)

CODE OF CIVIL PROCEDURE.

1. Section 66—Effect of the provisions of this section on the right of set-off as affecting an attorney's lien for costs. (*Ennis agt. Curry, ante, 1.*)

2. Section 190—A proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action but a special proceeding.

An order of general term granting a new trial in such proceedings is not appealable to this court; it is not a final order, and in a special proceeding no appeal to this court is authorized except from a final order (*Code of Civil Procedure, sec. 190*). (*Roe agt. Boyle et al., 81 N. Y., 305.*)

3. Section 190—The supreme court has discretionary power to grant or withhold a common law *certiorari*, and the exercise of this discretion cannot be reviewed here.

Unreasonable delay in applying for the writ is a good ground for quashing it after hearing on a return thereto.

The provision of the Code of Civil Procedure regulating appeals to this court in such cases (*sec. 190,*

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subds. 2, 3), does not differ in meaning from that of the Code of Procedure.

People ex rel. Citizens' Gas Co. agt. Bd. of Assessors (39 N. Y., 81); *People ex rel. Vanderbilt agt. Stillwell* (19 N. Y., 531), distinguished. (*People ex rel. agt. Bd. Police Comr's*, 82 N. Y., 506.)

4. Section 190 — An order of reference, to take proof as to charges made by creditors against an assignee for the benefit of creditors, is not reviewable here, as it is an order, not final, made in a special proceeding (*Code of Civil Procedure, sec. 190, subd. 3*). (*In Matter of Jacob Friedman*, 82 N. Y., 609.)
5. Section 191 — This action was brought to recover a balance of \$639, alleged to have been found and agreed to be due plaintiff on a settlement and account stated between him and defendant on May 1, 1876, and for labor of plaintiff and son between that day and December 9, 1876. Defendant, in his answer, after denying many of the allegations of the complaint and alleging payments, expressly admitted an indebtedness of \$230 89 "over and above all payments, offsets and counter-claims." During the trial defendant asked to amend his answer by alleging therein a counter-claim for \$700. This application was denied on the ground that the facts offered to be proved would not constitute a counter-claim:

Held, that the amount in controversy was less than \$500 within the meaning of section 191 of the Code of Civil Procedure, and so the case was not appealable to this court; that if the counter-claim had been alleged in the answer and put in issue by a reply, the amount in controversy would have been sufficient to allow an appeal, but as the counter-claim was not so alleged, it was not in controversy; that it mattered not that the referee placed his refusal to allow the amendment upon an

erroneous view of the law; if an error was committed, such error could be reviewed only like any other error committed on the trial, and the amount in controversy would have to be determined by the pleadings as they actually were. (*Wiley agt. Brigham*, 81 N. Y., 13.)

6. Section 191 — In the provision of the Code of Civil Procedure limiting appeals to this court (*sec. 191, sub. 3*), the amount demanded in the complaint is made controlling only in actions not founded on contract, because in actions *ex contractu* the facts alleged in the complaint may show that plaintiff, if successful, would not in law be entitled to so large a recovery; the distinction is not based upon the theory that in the latter class of actions plaintiff may recover more than he demands in his complaint. (*Van Gelder agt. Van Gelder*, 81 N. Y., 128.)
7. Section 198 — Upon appeal from a judgment of special term, dismissing plaintiff's complaint, the general term reversed the judgment, directed that an "interlocutory judgment be entered upon the facts found by the court; that a referee be appointed to take and state the accounts of the respective parties, and that, upon the filing and confirmation of his report, a further and final judgment should be entered by the special term for the final disposition of the entire controversy between the parties." Plaintiff appealed to this court from the order, and the order of special term entered in pursuance thereof; he gave no stipulation for judgment absolute in case of affirmance:

Held, that the order of general term was not a "final judgment" within the first subdivision of this section; nor was it an order which in effect determined the action and prevented a final judgment, or an order made upon or deciding an interlocutory applica-

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tion, or an order deciding a question of practice within the second subdivision of said section; that as there was no stipulation it was unnecessary to determine whether the order could be regarded as an order granting a new trial. Appeal therefore dismissed. (*Jones* agt. *Jones*, 81 N. Y., 35.)

8. Sections 316, 755, 756, 757, 763 — While, under the Code of Procedure (*secs. 46, 47, 58 of Code of 1848; secs. 53, 54, 65, Code of 1849*), an action could not be brought in the marine court of the city of New York against an executor or administrator as such, yet, where after the court had acquired jurisdiction of an action the defendant died, the action did not abate, but could be continued against his personal representatives.

This rule is not changed by the Code of Civil Procedure, as, while a similar prohibition is contained therein (*sec. 316, sub. 3*), the provisions for continuing actions (*secs. 755, 756, 757*) are made applicable to the marine court (*sec. 5, chap. 449, Laws of 1876, as amended by sec. 5, chap. 318, Laws of 1877*), and the law stands as it did under the former Code.

After judgment had been rendered against defendant, in an action in the marine court, and after an appeal from the judgment had been argued at the general term, but before decision, the defendant died; on motion of plaintiff the marine court granted an order continuing the action against the executor of the will of the deceased defendant, to whom letters testamentary had been issued. The general term, in the meantime, reversed the judgment and granted a new trial. On application of the executor the supreme court granted a writ of prohibition, restraining the marine court from entertaining further jurisdiction of the action:

Held, error; also, that the order affected and deprived plaintiff of a substantial legal right, and in

effect determined the action, and so was reviewable here.

Also, *held*, that even if the decision of the general term of the marine court was void under the Code of Civil Procedure (*sec. 763*), because rendered after the death of the defendant, the point was not available on appeal to this court, from the order granting said writ.

People ex rel. agt. Justices, &c., Marine Court (18 Hun, 333), reversed. (*People ex rel. agt. Justices, &c.*, 81 N. Y., 500.)

9. Sections 381, 414 — Plaintiff owned a bond and mortgage which became due and payable November 1, 1857; she was then a married woman. Her husband died September 8, 1866. She commenced this action to foreclose the mortgage December 10, 1877:

Held, that by force of said amendment plaintiff had but twenty years from the time the cause of action accrued in which to bring her action; and that, therefore, it was barred by the statute.

Also, *held*, that the provision of the Code of Civil Procedure (*sec. 381*) which saves from the application of its periods of limitation a case where a person was entitled, when it took effect, to commence an action, if such action be brought within two years of that time, did not relieve the plaintiff, as in such a case it is declared (*sec. 414*) that the provision of law then applicable should continue to be applicable notwithstanding its repeal. (*Acker* agt. *Acker et al.*, 81 N. Y., 143.)

10. Section 384 — False imprisonment — when a right of action therefor accrues — when it is barred by limitation under. (*See Van Ingen* agt. *Snyder*, 24 Hun, 81.)

11. Sections 388-414 — *People ex rel. agt. Dayton* (55 N. Y., 367), distinguished. (*In the Matter of*

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Manhattan Savings Institution, 82 N. Y., 142.)

12. Section 403 — Statute of limitations — the extension of one year given by the last clause of it is not applicable to a case where the letters were not issued until after the claim was barred. (*See Chapman agt. Fonda*, 24 Hun, 130.)

13. Sections 484, 488 — Where plaintiff sets up a claim against a railroad corporation for penalty incurred for excessive fare taken on one trip, and damages for personal injuries for unlawful ejection from defendant's cars on a subsequent trip, and defendant demurs to the complaint because, under section 484 of the New York Code of Civil Procedure, two causes of action have been improperly united:

Held, that, under section 488, a cause of action for penalty cannot be joined with a cause of action for personal injuries, even when they are claims arising out of the same transaction; and, at any rate, the claims in this action cannot be considered as arising out of the same transaction.

But section 484 should be construed to refer to cases of two or more good "causes of action" well pleaded, and the claim for a penalty in this case being insufficient in form and substance, the complaint contains but one cause of action, and that for personal injuries; and the demurrer should, therefore, be overruled, and the irrelevant matter in reference to the penalty should be stricken out. (*Sullivan agt. New York, New Haven and Hartford R. R. Co.*, ante, 490.)

14. Section 533 — It seems doubtful whether this section applies to foreign judgments or judgments of any other state. (*De Nobele agt. Lee et al.*, ante, 272.)

15. Section 535 — The Provision of the Code (*Code of Pro.*, 165; *Code*

of Civil Pro., 535) authorizing proof of mitigating circumstances, notwithstanding defendant has pleaded or attempted to prove a justification, was intended simply to change the rule of pleading and not the effect or admissibility of evidence further than the change in the form of pleading did so. (*Hatfield agt. Lasher*, 81 N. Y., 246.)

16. Sections 549, 550 — Arrest of a defendant for fraudulently disposing of his property — when the fraud need not be alleged in the complaint. (*See Duncan agt. Guest*, 24 Hun, 639.)

17. Section 552 — This section of the Code of Civil Procedure was intended to, and did settle the rule as to the effect of a judgment in the court of another state, and as to the right to an order of arrest, and confers an absolute right to sue for the original cause of action; and within the provisions of this section, the action may be maintained upon the judgment and an order of arrest be granted upon proof that a proper cause of action originally existed. (*Barter agt. Drake*, ante, 365.)

18. Sections 578, 579, 580, 1303, 1334, 1335 — Where in a cause pending in Rensselaer county the judgment was docketed November 7, 1879, and notice of the entry thereof was served November eighth and notice of appeal was given November tenth. The sureties on the first undertaking did not justify, and one of the sureties on the second undertaking was rejected December second. By consent the time to give another surety was on that day extended ten days, so that the time to perfect the undertaking expired December 18, 1879. On December thirteenth a new undertaking was given, and the surety, on examination before judge DONOHUE in New York, was rejected December 22, 1879; and on the same day the defendant

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obtained an *ex parte* order from judge DONOHUE, in New York, giving him twenty additional days in which to give an undertaking. On motion by plaintiff to vacate the order:

Held, that the order was irregular for the following reasons:

First. The time allowed by law for giving the undertaking having expired, the defendant could only be relieved under section 1303 of the Code of Civil Procedure, of which plaintiff was entitled to notice.

Second. The order could only be made by the court (section 1303); and that granted was a judge's order.

Third. The cause was pending in Rensselaer county and relief could only be granted in that district, or in a county adjoining Rensselaer, on notice (Code of Civil Procedure, section 769).

Held, further, that while the order must be vacated with costs, the defendant should be relieved on terms. Upon payment of eighty dollars costs within twenty days, the defendant has leave within the same time to perfect a new undertaking. (*Wheeler* agt. *Millar*, ante, 396.)

19. Section 626—Under the provisions of this section of the Code of Civil Procedure, the application to this court to vacate an injunction shall be *ex parte*, and wholly based upon the papers upon which the order was granted. The Code does not contemplate a hearing of both parties on such an application. (*Coffin* agt. *Prospect Park and Coney Island Railroad Company*, ante, 105.)

20. Section 682—A mere levy under an execution upon property which has been attached is not such an "actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action," within the meaning of this section of the Code of Civil Procedure,

as will bar a subsequent lienor of the right to move to vacate the attachment. The section means an actual and real application as distinguished from a constructive one. (*Woodmansee* agt. *Rogers*, 82 N. Y., 88.)

21. Section 713—When the plaintiff has such an interest in the property as to authorize the appointing of a receiver under. (*See State Bank of Syracuse* agt. *Gill and ano.*, 23 Hun, 410.)

22. Section 713—To entitle a creditor to the aid of a court of equity in reaching assets there must be a judgment, an execution issued thereon and a return thereof unsatisfied.

The fact that the debtor is an insolvent corporation and has conveyed its property in contravention of the statute does not authorize a resort to equity until the remedy at law has been thus exhausted.

Nor can an equitable action be upheld on the ground that the appointment of a receiver is necessary to preserve the property from misappropriation and waste pending the litigation.

The provision of this section in relation to receivers has not changed the practice in this respect or established any new rule authorizing an equitable action before a judgment is obtained. (*Adee* agt. *Bigler*, 81 N. Y., 349.)

23. Section 757—*It seems*, that the effect of the provision of the Code of Civil Procedure (sec. 757, as amended by chap. 542, Laws of 1879), requiring the court, on motion, to revive an action "in case of the death of a sole plaintiff or a sole defendant" where "the cause of action survives or continues," is to take away the discretion which the court previously had, either to grant leave or to put the party to his bill of revivor, and requires that the relief shall be granted on motion, making the

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motion a complete substitute for the bill.

But the provision does not compel the granting of the motion in all cases; it simply requires that, where the party has the right to a revivor or continuance, the relief shall be granted on motion.

This right is to be determined according to the settled rules of equity, so far as established by precedent.

It is a rule of equity thus established, that the discretion of the court to refuse to revive a suit on the ground of delay, is to be guided by the statute of limitations applicable to the subject-matter of the suit.

It seems also that said provision of the Code is not limited to actions originally brought by a single plaintiff against a single defendant.

Where all of several defendants but one have died, and the right of action has survived against him, he is a sole defendant within the meaning of the provision; and upon his death the action may be revived against his representatives.

It is, however, only to the case of a sole defendant that said provision applies, and the action can be continued under it only against the representatives or successors in interest of such sole defendant. (*Coit* agt. *Campbell*, 82 N. Y., 509.)

24. Section 758 — This section, providing that the estate of one jointly liable upon a contract shall not be discharged by his death, is not applicable to contracts made prior to its adoption. (*Richardson* agt. *Draper*, 23 Hun, 188.)

25. Section 779 — This action was noticed for trial by both parties for the February term, 1878. In June, 1878, a motion made by the defendant was denied, with ten dollars costs, which have never been paid. In February, 1879, the action was reached upon the calendar, and on the plaintiff's fail-

ing to appear, a judgment by default was taken by the defendant:

Held, that the failure of the defendant to pay the costs awarded against him, operated, under this section of the Code of Civil Procedure, to stay all proceedings on his part; that he had no power to move for a dismissal of the complaint, and that the judgment should be set aside as entirely unauthorized. (*Brown* agt. *Griswold*, 23 Hun, 618.)

26. Sections 828, 829 — When a defendant who has made no defense cannot testify for a co-defendant, as to personal transactions with a deceased person. (*See Hill* agt. *Hotchkiss*, 23 Hun, 414.)

27. Section 829 — Upon the trial of an action brought against the representatives of a deceased person, the plaintiff having been called as a witness in his own behalf, the counsel for the defendants, before the plaintiff had been sworn or given any testimony, objected to him "on the ground that he is (was) an interested party, and competent under this section of the Code of Civil Procedure." The objection was overruled, and the plaintiff having been sworn gave testimony as to personal transactions had with the deceased, without any specific objection thereto being made by the defendants:

Held, that the objection was invalid, as being too general, and that it was properly overruled by the court. (*Hoar* agt. *Hoar*, 23 Hun, 33.)

28. Section 829 — Under this section of the Code of Civil Procedure a party cannot be examined as a witness in his own behalf against the administrator of a deceased person, as to any personal transaction or communication had by him with the deceased, unless the administrator has been examined in his own behalf concerning the same transaction or communi-

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cation. (*Ward* agt. *Plato*, 23 *Hun*, 402.)

29. Section 829 — Evidence — when a party cannot testify as to a personal transaction with a deceased person. (*See Wilkins* agt. *Baker*, 24 *Hun*, 32.)

30. Section 829 — Fraudulent representations — by husband inducing conveyance of dower interest by the wife — this section of the Code of Civil Procedure, not applicable to the wife's testimony as to representations made. (*See Witthaus* agt. *Schack*, 24 *Hun*, 327.)

31. Section 829 — Evidence — the testimony of a party taken at the instance of his adversary, is admissible in his own behalf after the death of the latter. (*See Rice* agt. *Motley*, 24 *Hun*, 143.)

32. Sections 829, 830 — To secure the joint bond of a husband and wife they executed their mortgage to C. upon lands owned by the wife alone. She thereafter conveyed the mortgaged premises to her son, who, in an action to foreclose the mortgage, brought by an assignee of the mortgagee, interposed the defense of usury; the mortgagors did not defend. The mortgagee died previous to the trial. This took place in 1878, when the original section 830 of the Code of Civil Procedure was in force, which provided in substance that where a party cannot be examined as a witness concerning a transaction with a deceased person under section 829, the husband or wife of said party cannot be examined concerning the same transaction. Upon the trial the son called his father, who negotiated the loan with the mortgagee, as a witness solely in his own behalf, to prove the usury:

Held, that as the mother, to whose title the son succeeded, would have been precluded from testifying in his behalf as to the transaction with the deceased, the

testimony of the father was properly excluded.

As to whether such testimony falls within the prohibition of section 829, *quære*. (*Whitehead* agt. *Smith*, 81 *N. Y.*, 151.)

33. Section 830 — A party who has been examined in the first trial, and who is rendered incompetent by the death of his adversary before the second trial, may have his testimony, given in such former trial, read at any subsequent trial.

The statute does not require that the testimony of the deceased party should be first offered.

The plaintiff was not allowed to read his own testimony taken on a former trial relating to personal transactions with the original defendant, who has since died, upon the ground that the jury having disagreed there had been no former trial:

Held, that, within the provision of this section of the Code of Civil Procedure, under which plaintiff claimed the right to read his testimony, the trial is concluded when the case is closed and submitted to the jury. (*Lawson* agt. *Jones et al.*, ante, 424.)

34. Section 834 — Evidence — what is such a communication between a patient and his physician that it cannot be disclosed by the latter. (*See Grattan* agt. *Metropolitan Life Ins. Co.*, 24 *Hun*, 43.)

35. Section 872 — Examination of party before trial — facts showing the testimony to be material and necessary must be alleged. (*See Crooke* agt. *Corbin*, 23 *Hun*, 176.)

36. Sections 893, 894 — Open commission — order allowing it to issue is not appealable. (*See Femi-son* agt. *Citizens' Savings Bank*, 24 *Hun*, 350.)

37. Section 993 — Under the provision of this section of the Code of Civil Procedure, which provides that a refusal to make any

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finding whatever upon a question of fact, on a trial by the court or a referee, where a request was seasonably made, is a ruling upon a question of law, a refusal of a request to find the fact, on the ground that the fact is immaterial, presents a question of law, and if the fact be material the ruling is error, although the fact be not conclusively proved, and the evidence as to it is conflicting. (*James agt. Cowing*, 82 N. Y., 449.)

38. Section 999—Under this section of the Code of Civil Procedure a party may move for a new trial on the ground that the verdict is contrary to law, and upon an appeal from an order denying such a motion the whole case is before the appellate court, upon the law as well as the facts. (*Tate agt. McCormick*, 23 Hun, 218.)

39. Section 999—This section of the Code does not authorize the trial judge to entertain a motion for a new trial on his minutes, in the case of the dismissal of the complaint on the plaintiff's own showing; the plaintiff's remedy being either by appeal or a motion for a new trial at special term on a case to be made and settled. (*Dusenbury agt. Dusenbury*, ante, 432.)

40. Section 1010—What is a sufficient decision in writing to meet the demands of this section. (*Eaton agt. Wells*, 82 N. Y., 576.)

41. Section 1011—Under this section of the Code of Civil Procedure, as amended by chapter 542 of 1879, when the referee to whom the parties have agreed to refer the action refuses to serve, the court *must*, on the application of either party, appoint another referee unless the stipulation expressly provides otherwise. (*May agt. Moore*, 24 Hun, 351.)

42. Sections 1013, 2038—Where the return and answer to an alternative *mandamus* shows that the trial

of the issues made thereby, will involve the examination of a long account, a compulsory reference may be ordered by the court.

These sections of the Code of Civil Procedure which are apparently in conflict, reconciled. (*The People ex rel. Parmenter agt. Wadsworth*, ante, 57.)

43. Sections 1013, 1544—Where, in an action for partition, there are a large number of defendants and many separate appearances, and where the case presents four distinct issues of fact, two of which affect distinct parts of the property, and the other two affect undivided shares in the whole of the remainder:

Held, that, though the cause can be better tried by reference than in any other way, yet, if any of the parties object to a reference, the case must go to a jury.

But, except as to the issues raised by claim of ownership of two pieces of the property, a compulsory reference may be ordered, and the action may be severed so as to try separately before a referee the issues as to the remainder of the property, the title to which is not in dispute. (*Cassedy et al. agt. Wallace et al.*, ante, 240.)

44. Section 1019—Under this section of the Code of Civil Procedure either party may terminate the reference, unless the referee has, within sixty days from the time when the cause was finally submitted to him, made his report and filed the same with the clerk, or delivered it to the attorney for one of the parties; it is no longer sufficient for him to have made his report and notified the party in whose favor it was made that it was ready for delivery. (*Phipps agt. Carman*, 23 Hun, 150.)

45. Section 1229—Matrimonial actions—power of the court on an application for judgment on the report of a referee, to examine

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the evidence. (*See Schroeter agt. Schroeter*, 23 *Hun*, 230.)

46. Sections 1236, 1245—The "judgment book" required to be kept by every clerk of a court of record (*Code of Procedure*, sec. 279; *Code of Civil Procedure*, sec. 1236), is a separate and distinct book from the "docket book" also required to be kept (2 *R. S.*, 360 sec. 13; *Code of Procedure*, sec. 282; *Code of Civil Procedure*, sec. 1254), and an entry of such a judgment in the "judgment book" is not sufficient; unless entered in the "docket book" it is not docketed within the meaning of the statute. (*Sheridan agt. Linden et al.*, 81 *N. Y.*, 182.)

47. Sections 1236, 1238, 1354—Upon appeal from judgment in this action the general term affirmed it, provided plaintiff would stipulate to deduct therefrom a specified sum; plaintiff filed the required stipulation also the decision of the general term, signed by one of the judges:

Held, that this was not an entry of judgment within the meaning of the provisions of the Code of Civil Procedure in reference thereto (secs. 1236, 1354).

The memorandum handed down by a general term of its decision of an appeal is not a judgment, but simply an authority to enter one.

Upon the filing of such decision a formal judgment should be prepared and entered in the judgment-book, attested by the signature of the clerk; and, to constitute a judgment-roll, a copy thereof should be annexed to the papers upon which the appeal was heard.

Accordingly *held*, that as the duty of preparing such judgment-roll is imposed upon "the attorney for the party at whose instance the final judgment is entered" (*Code*, sec. 1238), an order was properly granted directing the plaintiff to enter judgment and file a judg-

ment-roll, and for that purpose authorizing him to file a printed copy of the case on appeal. (*Knapp agt. Roche*, 82 *N. Y.*, 366.)

48. Section 1247—A referee appointed to sell real estate in pursuance of a judgment may appeal from an order fixing his compensation. (*See Hobart agt. Hobart*, 23 *Hun*, 484.)

49. Section 1338—The fact that an agent, intrusted with money of his principal to invest, exacts a bonus for himself, without the knowledge or assent of his principal, as a condition of making a loan, does not establish usury. The principal is not liable for such an unauthorized act of the agent, in the absence of proof that he received a portion of the bonus or in some form reaped a benefit or advantage from the same.

An order of general term, reversing a judgment entered upon a decision of the court, stated that the reversal was "upon the law and the facts":

Held, that it sufficiently appeared that the reversal was "upon a question of fact," within the meaning of the provision of the Code of Civil Procedure, authorizing a review of such a question by this court. (*Van Wyck et al. agt. Waters*, 81 *N. Y.*, 352.)

50. Sections 1349, 1351—When a stay of proceedings should be granted under, during the pendency of an appeal from an interlocutory judgment. (*See Coleman agt. Phelps*, 24 *Hun*, 320.)

51. Section 1377—*Quere*—what constitutes the return of an execution "unsatisfied or unexecuted," as those terms are used in. (*See Frean agt. Garrett*, 24 *Hun*, 161.)

52. Section 1525—The Code of Civil Procedure has not changed the former practice, in actions of ejectment, of making an order (before

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judgment is perfected) that when the judgment is perfected it be thereupon vacated, and a new trial ordered without further order of the court. (*Post* agt. *Moran*, *ante*, 122.)

53. Section 1670 — Where the complaint, after reciting the necessary facts leading thereto, prays that the rights and interests of the respective parties in certain premises and appurtenances may be determined and adjudged, and that the premises may be sold and the proceeds divided, claiming on behalf of plaintiff and another, that they are entitled to one-sixth of the net rents and income of the premises; and where the answer denies that either is so entitled:

Held, that the action is one which is brought to recover a judgment affecting the title to and the use and possession of real property, and is, therefore, embraced within the provisions of this section of the Code. (*Kunz* agt. *Bachman*, *ante*, 519.)

54. Section 1678 — The word "must," in this section of the Code of Civil Procedure, is directory merely, and a foreclosure sale of two buildings is not invalidated because they have been sold together.

The question whether a sale in one parcel is proper or not, is one that must be determined by the circumstances of each case. (*Wallace et al.* agt. *Feely et al.*, *ante*, 225.)

55. Sections 1772, 1775, 2268, 2269 — Although from the provisions of the Code of Civil Procedure it seems that the husband may be committed to prison without notice, if he fails to pay the alimony awarded, provided that the court shall decide that sequestration or the giving of security would not result in getting the money for the wife, yet it seems the court will not imprison the husband for the nonpayment of alimony without first giving him notice of the ap-

plication for his commitment, when it has not adjudicated that it would be of no avail to make an order of sequestration, or for the giving of security.

It was the intention of the codifiers to change the law as it existed under the Revised Statutes, and to prohibit the commitment of the husband for the failure to pay alimony, until the court had become satisfied by proof that the money could not be collected either by sequestration or by requiring the husband to give security.

The court may determine that it would be useless to order sequestration or security. When it so determines the husband may be committed without notice if he neglects to pay the alimony which he is ordered to pay. (*Isaacs* agt. *Isaacs*, *ante*, 369.)

56. Section 2100 — A writ of prohibition is a preventive remedy, not a corrective one. It can only be used to prevent the doing of an act about to be done, not as a remedy for acts already completed.

The judicial proceedings of excise commissioners terminates when the board pronounces its judgment revoking a license, and the taking possession of the license is a ministerial act, to which prohibition will not lie.

The provisions contained in this section of the Code of Civil Procedure "that the tribunal proceeded against may be directed to amend or vacate proceedings theretofore taken in the matter, applies only to interlocutory or *mesne* proceedings prior to the final decision. (*People ex rel. Gould* agt. *Commissioners of Excise*, *ante*, 514.)

57. Sections 2260, 2265 — In summary proceedings by a landlord to remove a tenant, where such tenant appeared and interposed an answer that he was an infant, and asked that a guardian *ad litem* be appointed, it was probably error in the district court justice to

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refuse to do so, for which the proceedings should have been reversed.

But the remedy of the tenant was by appeal or motion to set aside the judgment, instead of an independent equitable action for a perpetual injunction against the enforcement of the order of dispossession.

Section 2265 of the Code of Civil Procedure prohibits the granting of an injunction in such a case as this. (*Jessurun* agt. *Mackie et al.*, ante, 261.)

58. Section 2260 — What errors of a justice in summary proceedings may be reviewed by appeal. (*See Jessurun* agt. *Mackie*, 24 *Hun*, 624.)

59. Section 2265 — When the enforcement of an order in summary proceedings for dispossession will not be restrained. (*Id.*)

60. Section 2434 — The supreme court is not deprived of jurisdiction in cases of supplementary proceedings by this section of the Code of Civil Procedure. (*Baldwin* agt. *Perry*, ante, 289.)

61. Section 2458 — Not applicable to supplementary proceedings on judgments on which executions have been returned unsatisfied prior to September 1, 1880. (*See Bean* agt. *Tonnelle*, 24 *Hun*, 353.)

62. Sections 2755, 2756, 2758, 2761, 2788 — It is entirely plain from these provisions of the Code of Civil Procedure upon this subject that the surrogate is the proper if not the ultimate tribunal for the determination of the claims of creditors, whether disputed or not, upon the real estate of the decedent sold under the order of the surrogate for the payment of debts and its proceeds. (*The People ex rel. Adams* agt. *Westbrook*, ante, 138.)

63. Section 3231 — Severance of ac-

tion — right of the plaintiff to have separate bills of costs taxed — right to have an extra allowance against each defendant. (*See Abbott* agt. *Johnstown, G. and K. Horse R. Co.*, 24 *Hun*, 135.)

64. Sections 3252, 3253 — In allowing compensation to the attorney of the assignee the court will not go beyond the \$2,000 allowed in the cases provided by these sections of the Code of Civil Procedure, unless the nature of the attorney's services is specifically detailed, in order that their value may clearly appear. (*Matter of Hulbert*, ante, 98.)

65. Section 3253 — In an action to restrain the recognition of a claim to an office, the defendants, upon plaintiff's default, on the case being called for trial, on notice, was granted an extra allowance:

Held, that the action was not one in which, under the Code, the court had power to grant an allowance; and that though the general notice of trial is sufficient notice for an application for an allowance upon a trial in cases where the law provides for an allowance, this being no case for an allowance, the order, though granted by default, is appealable. (*Voorhis* agt. *French*, ante, 161.)

66. Section 3253 — The word "involved," as used in this section of the Code of Civil Procedure, means "affected."

Where the plaintiff claimed that the defendant, the Western Union Telegraph Company, had no legal right to the property of the American Union Telegraph Company, and the defendant claimed it was the legal owner of the property, and the court sustained its claim:

Held, that the title of the defendant to this property was affected by this judgment, and an extra allowance to defendant may be computed upon the value of such property, as "the subject-matter involved." (*Williams* agt. *Western*

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Union Telegraph Company, ante, 305.)

67. Sections 3297, 3307, 3308—Under section 3307, subdivisions 7 and 11, of the Code of Civil Procedure, the sheriff is entitled to two and one-half per cent upon the sum recovered, not exceeding \$250, and one per cent upon the residue.

The referee is also entitled, under section 3297 of the Code of Civil Procedure (upon distribution), to one-half of an executor's commissions. But he is only entitled to these commissions upon such of the proceeds as he actually distributes or applies. (*Maher agt. O'Connor, ante, 103.*)

COMMISSION.

1. A commission may be issued to take the testimony of one committed to a lunatic asylum in another state, on the ground of insanity, but upon the trial of the action the return thereto must be first submitted to the presiding justice, who shall determine, on an examination of the answers therein contained, and of such witnesses having knowledge of the subject, as may be produced before him, whether or not the mental condition of the witness is such as to render his testimony admissible in evidence. (*Hand agt. Burrows, 23 Hun, 330.*)

COMMISSIONS.

1. Where, under a power in a will authorizing a sale for the purpose of a division of the proceeds, an executor sells real estate subject to mortgages existing thereon at the time of the testator's death, or sells the real estate free from the incumbrance, paying off such incumbrance from the proceeds of sale, he is only entitled to commissions upon the amounts

actually received for the equity of redemption, and cannot charge them also upon the amount of the mortgages on the property sold. (*Baucus agt. Stover, 24 Hun, 109.*)

2. In this state there is no fixed rule, applicable to all cases, determining whether or not a mortgagee in possession is, upon an application by the mortgagor to redeem, entitled to commissions upon the amount received and expended by him.

The decision of this question rests in the discretion of the court or referee trying the action, and when it is not unreasonably exercised the appellate court will not interfere therewith. (*Green agt. Lamb, 24 Hun, 87.*)

COMPLAINT.

1. The facts required to be alleged in the complaint in a suit for divorce—that the alleged adultery was committed without plaintiff's consent, connivance, privity or procurement; that five years have not elapsed since its discovery, and non-cohabitation thereafter—are to be considered, where the complaint is verified, a matter of affirmative defense, which the defendant, in view of the disability of the statute, is bound to controvert and disprove. (*Farace agt. Farace, ante, 61.*)
2. A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, cannot prevail, unless it is apparent from an examination of the complaint, taking all its allegations to be true, that no cause of action whatever is stated. (*Pier-son agt. McCurdy, ante, 134.*)
3. The fact that the plaintiff may, in his complaint, have demanded relief to which he is not entitled, or may have misconceived the nature of the judgment which the

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court should pronounce upon the facts set forth in the complaint, does not make the complaint bad upon demurrer, if those facts entitle him to any judgment or any relief. (*Id.*)

4. The complaint alleges that defendant, knowing that the stock of the Widows and Orphans' Company, in which he was a trustee, was greatly impaired and depreciated in value, became a party to a transaction by which he knowingly and illegally received the trust funds of the Mutual Protection Company in payment for the former company's stock, and that, with such knowledge, he disbursed the money thus received to himself and others in payment for such stock; that he also received \$25,000 for his services in acting in the capacity of stakeholder of the moneys and stock pending the consummation of the agreement between the parties, and also paid to the president of the Widows and Orphans' Company, \$10,000, in pursuance of the agreement alleged in the complaint:

Held (overruling demurrer to complaint as not stating facts sufficient to constitute a cause of action), that the complaint states facts sufficient to show a fraudulent conspiracy on the part of defendant, with others, to illegally obtain the trust moneys of the Mutual Protection Company; defendant being bound to know that that company was prohibited from investing its funds in stock below par, and the extravagant price paid for the stock in itself raising the presumption of fraud. (*Id.*)

5. There is no defect of parties defendant, though others alleged to have been engaged in the scheme are not joined, because these parties were joint tortfeasors with defendant, and severally as well as jointly liable to plaintiff; and it is, therefore, at his option to sue any one or all; and the fact

that equitable relief is demanded does not affect the question as to parties. (*Id.*)

6. Cause of action for the conversion and wrongful detention of personal property, and for an accounting between the parties, cannot properly be united in the same complaint. (*Thompson agt. St. Nicholas National Bank, ante, 163.*)

7. Where plaintiffs claim the right to maintain the action in some representative capacity conferred on them by some foreign tribunal, and that the cause of action passed to them by virtue of their appointment and by virtue of the operation of the laws of a foreign country:

Held, first, that these matters constitute traversable facts as to which defendants should have definite information.

Second, it is doubtful whether section 533 of the Code of Civil Procedure applies to foreign judgments or judgments of any other state. (*De Nobile agt. Lee et al., ante, 272.*)

8. Where plaintiff sets up a claim against a railroad corporation for penalty incurred for excessive fare taken on one trip, and damages for personal injuries for unlawful ejection from defendant's cars on a subsequent trip, and defendant demurs to the complaint because, under section 484 of the New York Code of Civil Procedure, two causes of action have been improperly united:

Held, that, under section 488, a cause of action for penalty cannot be joined with a cause of action for personal injuries, even when they are claims arising out of the same transaction; and, at any rate, the claims in this action cannot be considered as arising out of the same transaction. (*Sullivan agt. New York, New Haven and Hartford R. R. Co., ante, 490.*)

9. But section 484 should be construed to refer to cases of two

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or more good "causes of action" well pleaded, and the claim for a penalty in this case being insufficient in form and substance, the complaint contains but one cause of action, and that for personal injuries; and the demurrer should, therefore, be overruled, and the irrelevant matter in reference to the penalty should be stricken out. (*Id.*)

10. Where an action is brought upon an instrument executed by a person as executor and trustee under a last will and testament, an allegation that such person as executor of such last will and testament executed the instrument is sufficient, though where one sues as executor the rule is different, in which case he must aver his appointment and title as such, in particular. Or where the action is brought to recover a debt due to or from a testator, an allegation is necessary showing the appointment of the executor, or administrator, as such, with all necessary details to make that act apparent (*Affirming S. C.*, 58 *How.*, 1). (*Kingsland agt. Stokes, ante*, 494.)

See BILLS, NOTES, CHECKS AND DRAFTS.

Southwick agt. First National Bank, ante, 164.

CONSTITUTIONAL LAW.

1. A general law for the administration of justice, either civil or criminal, which professes to be for the government of the whole state, must operate equally upon all. (*Matter of Bayard, ante*, 294.)
2. A statute is not in accordance with an instrument under which courts are established, and their grades fixed, which undertakes to clothe a local and inferior judicial tribunal with power to punish a crime against the general criminal code of the state with more severity than is possessed by those of higher and general jurisdiction; and it is equally clear that special statutes, which arbitrarily, and without the existence of any public need therefor, punish any offense under a general law of the state, when committed in a locality, or part of a locality, or by particular individuals, with a greater penalty than when committed elsewhere in the same county and state, or by others, are certainly destructive of the equal rights of citizens under the law, which equality is our protection as well as our pride; and the attempt to make the gravity of punishment of a crime depend upon the exact spot of its commission, and not upon the degree of criminality, as shown by the attending circumstances, is repugnant to any just theory upon the administration of criminal justice. (*Id.*)
3. When a state has, by a general law, created a crime and fixed the maximum of its punishment, a special statute operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition of *section five of article one* of the constitution of the state as to "cruel and unusual punishments." (*Id.*)
4. The power which the charter of the city of Cohoes (*Laws of 1876, chap. 440, as amended by Laws of 1880, chap. 456*) has attempted to confer upon its recorder cannot be upheld, because it is subversive of the principles of our fundamental law; and it also violates an express constitutional provision. (*Id.*)
5. When the general law has in plain

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- words declared what shall be the maximum of punishment for a particular crime all over its jurisdiction, and has thus proclaimed the adequacy and sufficiency of the penalty thereby imposed for the offense, a special statute, which excepts from the operation of the general law a small portion of the state and gives to a local magistrate within such excepted district power to inflict double that punishment for the same crime, when committed therein, cannot be upheld, and must be declared void, because it authorizes the infliction of a cruel and unusual punishment. (*Id.*)
6. County courts have jurisdiction of an action brought to recover damages for an alleged assault and battery where the amount demanded is \$2,000. (*Sweet* agt. *Flannagan*, ante, 327.)
 7. Chapter 480 of the Laws of 1880, conferring jurisdiction upon county courts, where the defendants reside in the county in which the action is brought, when the relief demanded is the recovery of a sum of money not exceeding \$3,000, is constitutional. (*Id.*)
 3. Where the alleged misconduct is denied, the affidavits and papers upon which the proceedings were instituted are not evidence upon the issues, but simply perform the office of pleadings or statements of the charges relied upon. Affidavits are sufficient to originate the proceedings, but upon the trial of the issues the common law rules of evidence must be observed. (*Id.*)
 4. The court has power when and while a defendant in an equity action is in contempt for disobeying its order, to refuse to hear him. (*Walker* agt. *Walker*, 82 N. Y., 260.)
 5. Where, therefore, the defendant in an action of divorce was in contempt because of disobedience of an order of the court directing the payment of alimony, held, that an order directing defendant's answer to be stricken out unless he obey the previous order within five days; also an order striking out the answer upon his failure to obey, and directing a reference to take proof of the facts stated in the complaint was proper. (*Id.*)
 6. The authorities upon the power of the court thus to punish for contempt collated. (*Id.*)

CONTEMPT.

See ALIMONY.

Isaacs agt. *Isaacs*, ante, 369.

1. An order of the supreme court punishing an attorney for professional misconduct, not committed in the presence of the court, but based upon evidence, is reviewable upon the facts in this court. (*In re Eldridge*, 82 N. Y., 161.)
2. The distinction between such a case and proceedings for a contempt occurring in the presence of the court, and where the facts are certified by the court pointed out. (*Id.*)

CONTRACT.

See INJUNCTION.

Cornell agt. *Utica, Ithaca and Elmira Railroad Company*, ante, 184.

See STATUTE OF FRAUDS.

Budd agt. *Thurber et al.*, ante, 206.

CONVEYANCES.

1. The statute (2 R. S., 135, sec. 1) has no application to real and actual alienation, upon valuable consideration and positive and real purposes, although incidental

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benefits are reserved to the grantor. (*Shoemaker agt. Hastings, ante, 79.*)

2. Its object is to render simply ineffectual, clearly nominal transfers of personal estate, when the entire use and control are, by declaration of trust, in or out of this instrument, left in him who makes the transfer. The statute only avoids conveyances which are wholly to the use of the grantor. (*Id.*)

3. The contract in question was made in September, 1871. The father was a man of intemperate habits, having a wife and four children. The plaintiffs were two of those children. The other two were a son, aged fourteen and a daughter aged eleven. The plaintiffs negotiated with the father for a purchase of the farm owned by him, which consisted of the "Kilbury lot," of which he held the title in fee, subject to a mortgage of about \$1,250, and another parcel known as the "Dorsey lot," which he held under a contract of purchase, on which there was due some \$850. The real estate was worth as follows: The Kilbury lot, \$2,750; the Dorsey lot, \$1,160. He was also indebted upon certain outstanding notes, given by him to various parties prior to the 1st of September, 1876. He also owned certain personal property, consisting of cattle, horses and farming utensils, some grain and cordwood. The value of the personal property was fixed at \$1,300, for which they were to give their father a mortgage, payable in ten years, with annual interest. But before the agreement was made the plaintiffs and their father agreed to maintain the two younger children until they should arrive at the age of twenty-one years, and then to pay each of them \$150, and that the mortgage to the father should be made for \$1,000 instead of \$1,300. Finally the articles of agreement were entered into September 20, 1876. The father agree-

ing to convey to the plaintiffs the "Kilbury lot" by a quit-claim deed, and to assign the "Dorsey lot;" and the plaintiffs on their part agreeing to pay all the promissory notes of their father given before September 1, 1876, and to pay the mortgage on the "Kilbury lot," and the amount unpaid on the contract for the "Dorsey lot," and also to support and maintain the younger children until they should respectively arrive at the age of twenty-one years, and then to pay each of them \$150, and to give their father a mortgage for \$1,000, as specified. Soon after the conveyances were executed and delivered as agreed:

Held, that the transfer was intended to be an actual alienation of the property described in it, and was not a conveyance in trust for the use of the grantor alone, and therefore did not fall within the condemnation of section 1 of 2 Edm. Stat., 135.

Held, further, that considering the amount of the property left in the hands of the father by the mortgage from the plaintiffs to him, as compared with the small amount of those debts which were not assumed by the plaintiffs, together with the willingness manifested by the father to secure, by good indorsed notes, the payment of the plaintiff's debt, and all the other debts then owing by him, the evidence presented a question of fact as to whether the father intended by the transfer of his real and personal property to delay, hinder or defraud his creditors, which should have been submitted to the jury, as requested by plaintiff's counsel:

Held, also, that there is nothing in the transfer of the property to the plaintiffs which necessarily operated as a fraud on the creditors of their father. (*Id.*)

CORPORATIONS.

1. Although the amount of property belonging to a corporation

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is one of the considerations which enters into the market value of its shares, yet such market value also embraces other essential elements. It is the estimate put on the potentiality of a corporation to avail itself profitably of its franchise, on its capacity and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value. (*Williams* agt. *Western Union Telegraph Company*, *ante*, 216.)

2. The difference between the actual value and the sum paid by the Western Union Telegraph Company for the property of the American Union and the Atlantic and Pacific Telegraph Company (if any) is not so great as to authorize finding that the agreement was fraudulent and therefore should be set aside on that ground alone. (*Id.*)

3. A corporation organized under the laws of the state of New York is authorized by these laws to issue scrip dividend to represent its surplus earnings. (*Id.*)

4. The action of the Western Union Telegraph Company in issuing certificates of stock to the amount of \$15,526,590 is not prohibited by the statute (2 *R. S.* [6th ed.], 398). (*Id.*)

5. The meaning of the words "capital stock" as used in this statute means the property and franchises of the company, and the statute itself means that no corporation shall divide among its shareholders any portion of "the property and franchises of the company." (*Id.*)

6. The capital stock of a corporation mentioned in its charter is not *per se* a limitation of the amount of property, either real or personal, which it may own. It may divide its profits among the stockholders at such times

and to such amounts as the directors may deem expedient. Instead of dividing the profits, they may, in their discretion, permit the surplus of property to accumulate beyond their original capital, as the interest of the corporation shall appear to dictate; and the corporation has, in the manner provided by law, a right to increase the number of certificates which represent the interest its stockholders have in its corporate fund. Such transaction is neither in law nor in fact a watering of the stock of a corporation. (*Id.*)

7. Chapter 399 of the Laws of 1875 provides the manner in which a company organized under the laws providing for the incorporation of telegraph companies can increase the number of shares of its capital stock:

Held, that the Western Union Telegraph Company has complied with the requirements of this law. It has published the notice as required, and has obtained the written consent of the shareholders owning and holding three-fourths in amount of its capital stock.

Held, also, that this increase of capital stock, authorized as it is by the laws of this state, is not against public policy, because the law-making power of the state has allowed it. (*Id.*)

COSTS.

See *WILL*.

Merriam agt. *Wolcott*, *ante*, 377.

1. Upon an application made by the appellant for the admission to probate of the will of her husband, by which he had given all his estate to her, and appointed her sole executrix, his brothers and sisters appeared and filed objections. The proctors for the contestants, after having cross-examined the witness by whom the due execution and publication of the will was proved, withdrew

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their objections, and the will was thereupon admitted to probate. Subsequently the counsel for the contestants made an affidavit setting forth various matters, consisting chiefly of statements made to them by their clients, many of which were scandalous in their character, and alleged that, after an examination of the witnesses, they had induced their clients to withdraw from the contest, in the interest of equity and of the public morals. Upon this affidavit they applied for an allowance in lieu of costs, which was granted by the surrogate:

Held, that the surrogate had no power to award either costs or allowances in lieu thereof, as the case was not one of a "contest" within the meaning of section 10 of 2 Revised Statutes, 223, authorizing costs to be awarded in such cases. (*Peck* agt. *Peck*, 23 *Hun*, 312.)

2. That even if the surrogate did have power to make an allowance, it was not a proper exercise of his discretion to grant one in this case. (*Id.*)

3. That, as the allowance was directed to be paid to the proctors, they were properly made parties to the appeal taken by the executrix. (*Id.*)

4. Where a verdict is rendered in favor of the defendants, in an action brought against them to recover damages for false and fraudulent representations alleged to have been made by them, and they have appeared therein by separate attorneys and served separate answers setting up the same defense, each defendant so appearing is entitled, in the absence of evidence showing that he has severed in his defense in bad faith and with intent to increase the costs, to tax a separate bill of costs against the plaintiff. (*Royce* agt. *Jones*, 23 *Hun*, 452.)

5. In an action brought by a judgment-creditor to set aside as fraudulent a conveyance of land made by the debtor, the costs are in the discretion of the court.

The rule that, in equitable actions, costs are in the discretion of the court, was not altered or affected by the adoption of the Code of Procedure. (*Black* agt. *O'Brien*, 23 *Hun*, 82.)

6. Costs, in excess of the amounts allowed by law, cannot be taxed by the agreement of the attorneys for the parties to the action. (*O'Keefe* agt. *Shipherd*, 23 *Hun*, 171.)

7. August 30, 1878, the plaintiffs herein recovered a judgment against one Smith, upon which an execution was issued on September 2, 1878. On August 16, 1879, the sheriff having failed to return the execution, the plaintiffs brought this action against him to recover damages because of his failure so to do. Thereafter, and on August 28, 1879, for the purpose of defeating the lien of the plaintiffs' attorney for his costs, included in the said judgment, and also his costs in this action, the plaintiffs settled with Smith and the sheriff, and the execution was returned by the latter satisfied:

Held, that the plaintiffs' attorney was entitled to continue this action, and to recover a judgment for the costs of the former action and also for the costs of this one. (*Wilber* agt. *Baker*, 24 *Hun*, 24.)

8. Upon an appeal from an order of a general term reversing, with ten dollars costs and disbursements, an order of the special term vacating an assessment, the court of appeals reversed the order of the general term, with costs. Upon the filing of the remittitur, an order was made at special term directing that the petitioners recover their costs of

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the appeal taken from the special to the general term:

Held, that the petitioner was only entitled to recover for the costs of the appeal to the general term the sum of ten dollars and his disbursements.

Quære, as to the right of the special term to make any allowance of costs on the appeal to the general term. (*Matter of N. Y. Prot. Epis. Pub. School*, 24 *Hun*, 569.)

9. When a judgment recovered by the plaintiff is affirmed at the general term but reversed by the court of appeals (by which latter court a reargument is ordered at general term), "with costs of the appeal to this court (the court of appeals) to abide the event of the action," and thereafter the judgment is, upon a reargument had at the general term, again affirmed, the plaintiff cannot include in his bill of costs, the costs of the first appeal to the general term. (*Bigler* agt. *Pinkney*, 24 *Hun*, 224.)

10. When a trustee during the pendency of an action brought by him receives and voluntarily disburses money belonging to the estate, and the defendant thereafter recovers a judgment against him for costs, the court may, if the trustee has no money wherewith to pay the judgment, allow the defendant to enter a judgment against him personally for the amount thereof. (*Butler* agt. *Boston and Albany R. Co.*, 24 *Hun*, 99.)

11. In an action to compel a party to lower the height of a dam and to recover the damages already occasioned by its having been kept at an improper height, the plaintiff cannot be allowed to include in his bill of costs the amount paid to a surveyor for making a survey and plans to be used upon the trial. (*Rothery* agt. *N. Y. Rubber Co.*, 24 *Hun*, 172.)

12. When a plaintiff, pending an appeal taken by the defendant from a judgment recovered against him, removes from the State, he cannot, while the judgment stands unreversed, be compelled to file security for costs. (*Flint* agt. *Van Deusen*, 24 *Hun*, 440.)

13. In an action of trespass upon lands the complaint alleged title and possession in plaintiff, both of which allegations were specifically put in issue by the answer. Plaintiff claimed damages for injuries to the freehold by the deposit of earth and rubbish thereon, as well as for the entry. Plaintiff recovered less than fifty dollars:

Held, that, as to entitle plaintiff to recover for the injury to the freehold, it was necessary to allege and prove his title, the question of title arose upon the pleadings, and that consequently a certificate that it arose on trial was unnecessary to entitle plaintiff to costs. (*Kelly* agt. *N. Y. & M. B. R. R. Co.*, 81 *N. Y.*, 233.)

14. An order of reference of a claim held by the receiver of an insolvent corporation directed the discontinuance of an action which had previously been brought by the receiver without costs:

Held, that it was in the discretion of the court whether or not to allow costs to the defendant. (*In re Crosby* agt. *Day*, 81 *N. Y.*, 242.)

COUNTY CLERK.

1. One O'Donnell, having applied by his agent Winslow, to the plaintiff, for a loan on bond and mortgage, was told to procure a proper search from the county clerk's office, and that if the property was clear he could have the money. Winslow, acting for O'Donnell, and at his expense, procured from the defendant, the county clerk, a search against the premises, from which was omitted a deed then on

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record, by which O'Donnell had conveyed to another person the premises in question. The plaintiff having made the loan in reliance upon the search, and being unable to collect the money on his bond and mortgage, brought this action against the defendant to recover the said amount as damages for the negligence of the defendant in omitting the deed from the search:

Held, that the defendant owed no duty to the plaintiff, and was not liable to him for the damages occasioned by the omission of the deed from the search. (*Day* agt. *Reynolds*, 23 *Hun*, 131.)

COUNTY COURTS.

1. County courts have jurisdiction of an action brought to recover damages for an alleged assault and battery where the amount demanded is \$2,000. (*Sweet* agt. *Flannagan*, ante, 327.)
2. Chapter 480 of the Laws of 1880, conferring jurisdiction upon county courts, where the defendants reside in the county in which the action is brought, when the relief demanded is the recovery of a sum of money not exceeding \$3,000, is constitutional. (*Id.*)
3. A county court has l.o. power to set aside, on a motion, a sale made by an assignee for the benefit of creditors, on the ground that the price paid was insufficient, and that a better one can be obtained.
Semble, that, upon the accounting of the assignee, the county court could charge him with any loss occasioned by his wrongdoing in making a sale at an inadequate price. (*Matter of Rider*, 23 *Hun*, 91.)
4. An order of the county court, setting aside such a sale on a motion, is appealable to the general term. (*Id.*)

5. The circumstances under which a court will not set aside a judicial sale considered. (*Id.*)

6. Where, by mistake, the land intended to be covered by a mortgage is therein so vaguely and uncertainly described as to render it impossible to identify and locate it, an action to reform the mortgage by correcting the error in the description of the land, and to foreclose the mortgage as so reformed, can be brought in the supreme court, but cannot be brought in a county court, the latter court not having jurisdiction of an action to reform a mortgage. (*Avery* agt. *Willis*, 24 *Hun*, 548.)

COUNTY JUDGE.

1. In an action brought in the supreme court to restrain the foreclosure by advertisement of a mortgage, a county judge may grant an order requiring the defendant to show cause before him why a temporary injunction should not be granted, and restrain him in the meantime from selling the premises at the time specified in the advertisement. (*Babcock* agt. *Clark*, 23 *Hun*, 391.)

CREDITOR'S ACTION

1. A loan of \$6,000 was made by A. to B., for the benefit of a manufacturing corporation of which B. was trustee, he giving as collateral security \$6,000 of the corporation's bonds, of which he was the owner. On nonpayment of the indebtedness, A. caused the bonds to be sold at public auction and to be bid in for his benefit by C., a clerk in the office of his attorneys, for a nominal sum for which C. gave his note, which was paid with funds furnished him for the purpose. A judgment subsequently recovered by C. against D. in this court for the amount

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of the bonds, for D.'s default as trustee of the corporation in filing annual reports, was satisfied upon payment by D. of \$1,300. A., who received no part of this money, moved to set aside the satisfaction (which was made without his knowledge) as in fraud of his rights, his attorneys joining in the motion, alleging a lien upon the judgment for professional services, of which lien C. was cognizant. The court refused to interfere. A., in a suit in his own name in the common pleas against D. and other of the trustees, to recover for the same defaults set forth in B.'s action against D., obtained judgment for the \$6,000 loaned by him to the corporation. D. and his cotrustees becoming aware long after both judgments were obtained that A. had sued in B.'s name and that both claims in fact belonged to A., sought to vacate the common pleas judgment but the application was refused, "without prejudice to any motion for any other relief." They then brought this action against A. to enjoin the enforcement of said judgment:

Held, 1. That this action is within the terms of the favor granted the moving party upon denial of the application to vacate the common pleas judgment:

2. Though in fact the corporation was indebted in \$12,000 on the bonds and money loaned, yet as the bonds belonged to B., a trustee, he could not maintain an action against cotrustees for defaults in filing annual reports in which he had participated; and A., after selling the bonds held by him as security for a debt, could not recover in a suit for his benefit on the bonds, and on the debt besides.

3. Such recovery for the advantage, in part, of B., could not be permitted, as it would be allowing by indirection what could not be done directly.

4. That A. and his attorneys have lost the fruits of the judg-

ment in favor of B., results from the unusual way in which they elected to proceed. (*Roach agt. Duckworth*, ante, 128.)

CRIMINAL TRIAL.

1. Upon the trial of an indictment for murder, where the evidence was conflicting, the court charged: "that the jury, if they believed the evidence offered in behalf of the people to be true, would be justified in finding the prisoner guilty of murder in the second degree."

Held, error; that the existence of the intent to kill, which is the necessary ingredient of that crime, was a question to be determined by the jury from all the facts and circumstances; and from the charge as given, nothing being said concerning their duty in this respect, it might well have been understood by the jury as involving an opinion of the court upon this as well as the other elements of the crime; and that it was likely to mislead and prejudice, as it virtually excluded from inquiry the question as to how far the testimony on the part of the prosecution was modified or neutralized by that produced by the defendant, or what inference should be drawn from any of it. (*McKenna agt. People*, 81 N. Y., 360.)

2. The verdict was manslaughter in the third degree, not "murder in the second degree."

Held, that this did not conclusively establish that the objectionable charge could have done no harm, that it could not be said the jury were not influenced by it. (*Id.*)

3. A husband and wife may be jointly indicted and convicted of a crime, where it appears that they were both guilty of the offense charged, and it is shown that there was no coercion, as in such case

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the wife acts in her own capacity, as one able to commit crime, and of her own accord and intent, the same as if she were an unmarried woman. (*Goldstein* agt. *People*, 82 N. Y., 231.)

4. Upon the trial of an indictment for receiving stolen goods, with knowledge, the court charged "that the possession of stolen goods, immediately after the larceny, if under peculiar and suspicious circumstances, where there is evidence tending to show that some other person or persons stole the property, such possession not being satisfactorily explained would warrant" a conviction:

Held, no error. (*Id.*)

5. To justify a conviction upon the trial of an indictment for obtaining property or the signature to a written instrument by false pretenses, it must appear by the evidence that the parting with the property or the signing of the instrument was by reason of some of the pretenses laid in the indictment, or that they materially influenced the action of the prosecutor. (*Therasson* agt. *People*, 82 N. Y., 238.)

6. It is not necessary, however, that this should be established by direct proof; it may be inferred from other facts tending legitimately to show it. (*Id.*)

7. Upon the trial of an indictment for obtaining the signature of Z. to the discharge of a mortgage by false pretenses, Z. was examined as a witness for the prosecution, but was not asked the direct question as to whether she was influenced or induced to sign by the representations proved. The prisoner's counsel asked the court to charge in substance that although the jury might find the false pretenses to have been made, and the necessary fraudulent intent, yet the jury had no right to consider these questions, or the evidence

as to them, in determining the question whether the pretenses exerted a material influence over the mind of Z.; the court refused so to charge:

Held, error; that while the falsity of the alleged pretense and the fraudulent intent of the prisoner were both necessary elements of the crime, the question whether the prosecutrix was influenced by the representations was a distinct one, having no necessary connection with the others, and proof of these others reflected no light upon it. (*Id.*)

8. Also, *held*, that the exception to the refusal to charge was not abandoned by a claim on the part of the said counsel that in the absence of testimony by Z., that she was influenced by the representations, the fact could not be proved from the other evidence. (*Id.*)

9. Upon trial of an indictment for assault and battery with intent to kill, the prosecution without objection gave in evidence certain notes, purporting to have been made or indorsed by H., the complainant, also a book of account; these the witness producing them testified came lawfully into his possession, at the prisoner's house, and in his presence. Testimony was then given by H. and others, showing that the signatures of H. to the notes were forged. H. was cross-examined at considerable length. Entries in the book of account were also read to the jury. After the case for the prosecution was closed the prisoner's counsel "moved that the court direct the jury to disregard all the evidence tending to establish the forgery," he admitting and asking it to be entered on the minutes, that if the jury should find that the prisoner committed an assault and battery, it was with intent to kill. The court denied the motion:

Held, that an exception to the ruling was unavailing; that after acquiescing in the reception of the

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evidence, and improving the opportunity afforded by it for cross-examination, it was too late to ask to have the evidence stricken out. (*Pontius* agt. *People*, 82 N. Y., 339.)

10. Also, *held*, that the evidence was properly received, as showing motive, although it tended to prove the commission of another crime. (*Id.*)

11. The prosecution gave evidence of declarations of the prisoner, made two days before the alleged assault, while he was examining a note signed by H., tending to show an intimate acquaintance on his part with the signature of H.: *Held*, competent. (*Id.*)

12. The account book received in evidence contained the handwriting of the prisoner:

Held, that it was proper to permit the jury to examine the entries in said book, and to compare them with the alleged forged notes. (*Id.*)

13. The prisoner was examined at length in his own behalf, asserting the genuineness of the notes, and that they were made in payment of moneys loaned by him to H.:

Held, that it was competent to inquire on cross-examination as to the sources from whence the prisoner procured the money to make the loans. (*Id.*)

14. Also, that it was competent for the prosecution to prove any facts tending to show the improbability of the prisoner's statement, *i. e.*, his pecuniary necessities, the borrowing of money by himself, at or about the time of the alleged loans, the non-payment of small debts when due, after frequent request, etc. (*Id.*)

DAMAGES.

1. Where false representations are made on the sale of a security the

remedy of the purchaser is not limited to a recovery simply of the money advanced, if he would have received a benefit beyond that had the fact been as represented. (*Grissler* agt. *Powers*, 81 N. Y., 57.)

2. The matter that will serve to mitigate damages in an action of libel must be connected with or bear upon the defamatory charge, *i. e.*, matter tending to prove the truth of the charge, or to show that there was induced in the defendant a belief of its truth, or prior publications of the plaintiff of such a nature as to exasperate and to call forth bitterness in reply. (*Hamilton* agt. *Eno*, 81 N. Y., 117.)

3. Facts proved in an action of slander in mitigation of damages must, to have that effect, have been known and believed by defendant at the time he uttered the slanderous words. (*Hatfield* agt. *Lasher*, 81 N. Y., 246.)

4. In an action of trespass the trespass complained of was the cutting and removing of timber:

Held, that evidence was properly received as to the value of the farm with the timber, and its value after it was cut; and that this difference furnished a proper measure of damages. (*Argotsinger* agt. *Vines*, 82 N. Y., 308.)

5. Damages cannot be assessed upon undertaking given on granting an injunction until a final decision that plaintiff was not entitled thereto, as until then there is no breach of the condition. (*See Johnson* agt. *Elwood*, 82 N. Y., 362.)

6. In an action to recover back moneys alleged to have been paid for forged bonds purchased by plaintiff through his agents, of defendant, it appeared that the agents charged and the plaintiffs paid more for the bonds than was paid by the former:

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Held, that plaintiff could not recover the excess of defendant. (See *Greenwood* agt. *Schumacker* [Mem.], 82 N. Y., 644.)

DEMURRER.

1. In this action, brought against the proprietor of the New York Herald to recover damages for a libel, alleged to have been published concerning the plaintiff, the complaint alleged that the plaintiff was engaged in carrying on business as a baker and restaurant-keeper in the city of New York, and was not, and never had been in any manner, a co-partner, owner or agent in any business or calling such as is described in the libel, or in the production of milk or distillery swill, so-called, or distillery waste or grain, or ownership or care of cows, or keeping or feeding of cows; it then alleged that the defendant published, concerning the plaintiff, an article, which it set forth in full, which related to a swill-milk establishment kept by Gaff, Fleischmann & Co., in Queens county:

Held, that a demurrer interposed to the complaint, on the ground that it appeared therefrom that the libel was not published of or concerning the plaintiff, should be sustained. (*Fleischmann* agt. *Ben-nett*, 23 Hun, 200.)

2. After judgment has been entered upon an order overruling a demurrer without leave to plead to the merits, or with leave not availed of, the court, in the exercise of its discretion, will not, as a general rule, grant leave to withdraw the demurrer and to plead. (*Fisher* agt. *Gould*, 81 N. Y., 228.)
3. Judgment having been entered against defendant upon an order overruling his demurrer to the complaint, he appealed to the general term. He subsequently moved at general term for leave to discontinue his appeal, to with-

draw his demurrer and to answer, which motion was by consent of counsel on both sides there heard:

Held, that upon appeal from an order granting the application, the objection could not be raised that the motion to withdraw the demurrer and answer could not properly be made at general term. (*Vanderbilt* agt. *Schreyer*, 81 N. Y., 646.)

DEMURRAGE.

1. Where a bill of lading contains a clause that in case the consignees of a cargo shall discharge the same they shall charge the master not to exceed ten cents per ton, and have four full working days to discharge the same after notice of the arrival of the boat at their dock, and to pay the master for any time the boat is detained for discharging, after the expiration of said four days, five dollars per day, and at the same rate for portions of a day:

Held, that the consignees had an election, upon the arrival of the boat, whether they would themselves unload the cargo or require the master to unload it. Primarily it was the duty of the master to unload the cargo. (*McLaughlin* agt. *Albany and Rensselaer Iron and Steel Co.*, ante, 439.)

2. Where in such a case the consignees upon the arrival of the boat offered the master dock room, though without special facilities for speedy and economical unloading, and notified him that they would not unload the cargo except he would wait his regular turn, and would not pay him demurrage:

Held, that this was notice to the master that the consignees elected not to unload the cargo except in its regular turn, and that the master, after such notification, having seen fit to wait his turn was not entitled to recover demurrage. (*Id.*)

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DISTRICT COURTS.

1. Under the old Code a warrant must be issued in the first instance in every case, to authorize the judgment allowing an execution against the person. (*Glacius agt. Moldtz, ante, 62.*)
2. As section 16 of the old Code is still unrepealed and operative, the only change made by the Code of Civil Procedure being that every action must be begun by summons and the substitution of orders of arrest for warrants of arrest, it would seem that the practice would be the same under the law as it now stands. (*Id.*)
3. In replevin proceedings in the district courts the undertaking, on the part of the plaintiff, must be approved by the justice, and not by the marshal. (*Grotz agt. Hussey, ante, 448.*)

DIVORCE.

1. The facts required to be alleged in the complaint in a suit for divorce — that the alleged adultery was committed without plaintiff's consent, connivance, privity or procurement; that five years have not elapsed since its discovery, and non-cohabitation thereafter — are to be considered, where the complaint is verified, a matter of affirmative defense, which the defendant, in view of the disability of the statute, is bound to controvert and disprove. (*Farace agt. Farace, ante, 61.*)

See FEES.

McQuien agt. McQuien, ante, 280.

See ALIMONY.

Isaacs agt. Isaacs, ante, 369.

DYING DECLARATIONS.

See EVIDENCE.

Waldele agt. New York Central and Hudson R. R. Co., ante, 350.

EJECTMENT.

1. The Code of Civil Procedure has not changed the former practice, in actions of ejectment, of making an order (before judgment is perfected) that when the judgment is perfected it be thereupon vacated, and a new trial ordered without further order of the court. (*Post agt. Moran, ante, 122.*)
2. One A. L., then in possession of the property, on March 31, 1866, executed a mortgage to one K. to secure the payment of \$920 and interest advanced by K. to A. L. to purchase the same. K. brought a suit in 1875 to foreclose the mortgage. G. and M. who held a subsequent mortgage defended on the ground that A. L. held no title. On the trial K. succeeded, and the premises were sold and K. bought. D. L. occupied one year under him and paid rent. Then one H. entered under K. and is still in possession. K. has since paid a prior mortgage of \$700, so that he has put in the property over \$1,600. Pending the foreclosure in August, 1875, the present action was brought against D. L., who was then in possession, to recover property for non-payment of rent. D. L. did not defend, and on June 27, 1876, the plaintiffs obtained judgment; M., of the firm of G. & M., being his counsel. Of all this K. was ignorant, and in 1877 paid the prior mortgage of \$700. G. & M. having obtained the title of present plaintiffs, bring ejectment against H., K.'s tenant, claiming that the judgment in this suit cuts off K.'s rights:

Held, that justice requires that the judgment in this action should be opened.

Held, also, that the motion can be granted under section 724 of the Code of Civil Procedure, as evidently there was a mistake, and no written notice of the judgment was given.

Held, further, that by the Re-

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vised Statutes (vol. 3, page 576, section 34, 6th edition) the court has power in "every judgment in ejectment rendered by default, on payment of costs, &c., &c., to vacate such judgment, and grant a new trial if such court shall be satisfied that justice will be promoted," &c., &c. Every judgment in ejectment rendered by default certainly includes one brought to recover for non-payment of rent (*Christie* agt. *Bloomingtondale*, 18 How., 12, not approved). (*Reed* agt. *Loucks*, ante, 434.)

3. A judgment by default in ejectment is not conclusive against persons claiming under the defendant, unless it has been for three years docketed in the office of the clerk of the court in which it was rendered (2 R. S., 309, sec. 38). (*Sheridan* agt. *Linden*, 81 N. Y., 182.)

4. The "judgment book" required to be kept by every clerk of a court of record (*Code of Procedure*, sec. 279; *Code of Civil Procedure*, sec. 1236) is a separate and distinct book from the "docket book," also required to be kept (2 R. S., 360, sec. 13; *Code of Procedure*, sec. 282; *Code of Civil Procedure*, sec. 1245); and an entry of such a judgment in the "judgment book" is not sufficient; unless entered in the "docket book" it is not docketed within the meaning of the statute. (*Id.*)

5. In an action of ejectment it was claimed on appeal that a judgment for the entire mesne profits had been taken against two of the defendants without proof of possession by them, or either of them, of the entire premises:

Held, that as it did not appear by the record that the point was brought to the attention of the trial court it was not available here. (*Hynes* agt. *McDermott*, 82 N. Y., 41.)

ESTOPPEL.

See PROMISSORY NOTE.

Fleischmann agt. *Stern*, ante, 124.

See MUNICIPAL CORPORATIONS.

Edwards agt. *City of Watertown*, ante, 463.

EVIDENCE.

1. Dying declarations have no weight as testimony in civil cases unless made under oath, whereas in murder trials the words spoken by the victim before expiring carry conviction with them. (*Waldele* agt. *New York Central and Hudson River Railroad Company*, ante, 350.)

2. On the trial of an action brought by plaintiff against the railroad company for damages for the killing of her son, evidence of declarations of the deceased, narrating the circumstances under which the accident occurred was admitted:

Held, that such declarations were merely hearsay and not admissible in evidence. (*Id.*)

3. A party who has been examined in the first trial, and who is rendered incompetent by the death of his adversary before the second trial, may have his testimony, given in such former trial, read at any subsequent trial. (*Larson* agt. *Jones et al.*, ante, 424.)

4. The statute does not require that the testimony of the deceased party should be first offered. (*Id.*)

5. The plaintiff was not allowed to read his own testimony taken on a former trial relating to personal transactions with the original defendant, who has since died, upon the ground that the jury having disagreed there had been no former trial:

Held, that, within the provision of section 830 of the Code of Civil

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Procedure, under which the plaintiff claimed the right to read his testimony, the trial is concluded when the case is closed and submitted to the jury. (*Id.*)

See WILL.

Gallup agt. *Wright*, ante, 286.

6. The plaintiff in error was indicted, tried and convicted of murder in the first degree for killing his wife. The wife was found dead in her bedroom with the mark of a severe blow from a club upon her head, and with her throat cut; the walls of the room and articles therein were spattered with blood, and a pool of it lay upon the floor under her bed. Upon the trial, a witness called for the prosecution having testified that on the morning of the day of the murder he saw a spatter or spot of a darkish red color on a flat stone in the path leading from the prisoner's house to the road, and having stated that he could swear, as a matter of fact, what the substance on the stone was, was asked to state what it was. The prisoner's counsel having objected to this question, on the ground that it was immaterial and irrelevant, and that the witness was not qualified to express an opinion whether it was blood or not, as he was not an expert, the court instructed the witness that his opinion was not asked for, and if he answered he would only be allowed to answer, as a fact, what the spot was. The witness then answered that the spot was blood:

Held, that the witness was properly allowed to answer the question, as the evidence referred to a matter of common observation, as to which an ordinary witness could speak. (*People* agt. *Greenfield*, 23 *Hun*, 456.)

7. Upon a trial evidence as to the conduct and bearing of a prisoner on the day of the murder, tending to show an indifference on his part as to the death of his wife, was

offered by the People and received against the defendant's objection and exception:

Held, that the evidence was properly received for the purpose of showing how the prisoner demeaned himself when the imputation of his crime was fresh upon him, and also to rebut the legal presumption that the affection existing between husband and wife will deter either one of them from wantonly doing an injury to the other. (*Id.*)

8. The counsel for the plaintiff in error offered in evidence two letters, purporting to have been written by one Royal Kellogg from Indiana, one to his brother, Alden Kellogg, who resided at the place of the murder, and the other to the sheriff. In these letters he admitted that he committed the murder, and that the prisoner was innocent. Both of the Kelloggs were in court at the time, but neither of them was called as a witness by either party:

Held, that the court properly excluded the letters as hearsay or derivative testimony, and also on the general ground that upon a trial for murder, declarations or admissions of persons, other than the prisoner, that they had killed the deceased, are not competent evidence in his favor. (*Id.*)

9. One Wyman, a witness for the defense, who lived in the house of one Taplin, about a mile and a-half from the prisoner's house, testified that, at about four o'clock in the morning of the day of the murder, he was awakened by the barking of a dog, and on looking out of the window he saw the two Kelloggs and Taplin standing back of the house; that Alden had a double-barreled gun and Taplin a bag with something in it; that one of the men washed his hands at the pump; that they changed their coats; that the Kelloggs went away with the gun and bag, and Taplin came into the house; that

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he heard a part but not all of the conversation. The counsel for the prisoner then offered to prove that on that occasion the witness heard Taplin say to Kellogg, "you were damned fools to do it;" and that one of the Kelloggs replied, "if we had not done it we should all have been hung." No other evidence was given tending to show that Taplin was with the Kelloggs on that night, or to connect the Kelloggs or either of them with the murder, or to show that the parties, or the gun and bag, came from the prisoner's house:

Held, that the court properly refused to allow the question to be put. (*Id.*)

10. One Snow, a witness for the people, testified that on the evening of the day of the inquest, the prisoner, after having been arrested and told by the coroner that he might get counsel or answer, or decline to answer, as he chose, asked the witness what he should do, and that the witness told him "if you are innocent, you can answer all the questions they can ask you, if not, you can decline," and that the prisoner said he would answer any questions they wanted to ask. The people then proved that the prisoner had declined to answer any questions before the coroner. The court, in charging the jury, stated that the fact that the prisoner refused to answer any question was not a circumstance which could be taken into consideration against him, as one indicating his probable guilt, unless it was accompanied by the statement made by Mr. Snow—that if he was guilty, he should decline, but if he was innocent he should go on. The counsel for the prisoner excepted to the latter portion of the charge:

Held, no error; that as the evidence had been received without objection by the prisoner, the jury might properly consider it as showing a part of his conduct while acting under the charge,

and as tending to show a vacillation somewhat suspicious.

That his answer to Snow might be considered as a consent to submit to an examination, and that he was thereafter subject to the same presumption as if his subsequent refusal to answer questions had occurred during an actual examination. (*Id.*)

11. After the charge, and before the jury had consulted on the case, the court called the jury back and, in the presence of the prisoner and his counsel, instructed them that as the evidence relating to the prisoner's declining to answer, after the interview between him and Snow, was somewhat equivocal, and they might be inclined to give it more weight than it should receive, they should not consider the fact of his declining to answer questions as evidence tending in any degree to establish his guilt in the case, but should wholly exclude all such evidence, and what had been said about it in the charge, from their consideration, and give it no weight whatever in the case:

Held, that the error, if any, in the charge, was thereby cured. (*Id.*)

12. This action was brought by the plaintiff, as the devisee of Charles Hathaway, deceased, to recover the possession of a lot formerly belonging to said Hathaway. The defense was, that the defendant had, prior to the death of the said Hathaway, entered into the possession of the lot under an oral agreement with him, which provided that the lot should belong to her, if she should thenceforth support and maintain one Mary Hathaway, a sister of the defendant and of the said Charles Hathaway, and that on the faith of the said agreement she did provide for and maintain the said Mary Hathaway, and made permanent and valuable improvements upon the property.

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Upon the trial, the defendant offered to prove that, after entering into possession of the premises, relying upon the said agreement, she made substantial and permanent improvements thereon:

Held, that the evidence was admissible, and that the court erred in excluding it. (*Dana* agt. *Wright*, 23 *Hun*, 29.)

13. The defendant offered to prove by a witness, that the latter had heard the plaintiff say, at least three different times, previous to the death of Charles Hathaway, and within a year thereof, that she was sorry for "her uncle Charles, and she did not know what he should do, for he had to give Mrs. Wright (the defendant) the house she lived in for taking care of Mary:"

Held, that the court erred in excluding the evidence. (*Id.*)

14. The plaintiff having received from the administrator of her father's estate two checks for \$500 each, payable to her order, delivered the same, indorsed in blank, to her husband, with directions to deposit the same to her credit with the defendant, the First National Bank of Brockport.

The husband deposited the checks in the bank to the plaintiff's credit and received a pass-book from the defendant, in which the amounts were credited to her. In an action by the plaintiff to recover the amounts so deposited, the defendant offered to prove that at the time the deposits were made it was orally agreed between the husband and the teller of the bank that they should be credited to the plaintiff upon the condition that the same should be withdrawn upon checks made by the plaintiff, or by the husband in her name, and that the amounts so deposited had been subsequently withdrawn by checks made by the husband in the name of the wife:

Held, that in the absence of evi-

dence tending to show an authority in the husband to act as the agent of his wife, or any ratification by her of his acts, the evidence was inadmissible and was properly excluded. (*Bates* agt. *First National Bank*, 23 *Hun*, 420.)

15. On the morning of November 10, 1879, one of the defendant's employes drove an ice wagon belonging to it in front of a house in Atlantic avenue, Brooklyn, delivered some ice there, and then went into an adjoining store to see about buying a bird for himself, leaving the horse untied and unattended. While he was in the store the intestate, a boy about five years old, was drawn along the sidewalk in a little wagon, by a boy of about his own age, who, when he came opposite to the cart, let go of the tongue of the wagon, whereby the deceased was thrown behind the feet of the horse, who started off, drawing the hind wheels of the cart over his body, occasioning injuries from which he died.

In an action to recover damages for his negligent killing, *held*, that the evidence was sufficient to sustain a verdict in favor of the plaintiff. (*Knupfle* agt. *Knickerbocker Ice Co.*, 23 *Hun*, 159.)

16. Upon the trial the plaintiff was allowed, against the defendant's objection and exception, to introduce in evidence an ordinance of the city of Brooklyn, making it unlawful for a team to stand in the street without a person in charge or without being secured to a tying post:

Held, no error. (*Id.*)

17. Upon the trial of the plaintiff in error, for murder, he was sworn and testified in his own behalf. Thereafter the court, after commenting on the right of one accused of crime to testify in his own behalf, and of the right of the jury to accept that part of such testimony which they be-

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lieved to be true, and to reject that which they believed to be false, said, "when a party in a civil action deliberately swears false to one material part of his testimony, and the jury are satisfied that he has so sworn falsely, intentionally false, they are not only at liberty to reject it, but it is sometimes the duty of the jury to reject the whole. The maxim is *falsus in uno falsus in omnibus*."

Held, that there was no error in the charge, as it properly left the decision of the question as to whether or not the whole testimony should be disregarded to the judgment of the jury, to be formed upon the whole case.

Seemle, that if the court had omitted the word "sometimes," and if the charge could be considered to apply to the present case, and not solely to civil actions, it would have been erroneous, as making an absolute rule of law out of that which is only a wise maxim, to be applied discreetly by the jury, according to their judgment in each case. (*People* agt. *Moett*, 23 *Hun*, 60.)

18. Nichols, the plaintiff in error, and one O'Connell, having had an altercation in a beer saloon, the latter struck Nichols and shoved him out of the saloon, and subsequently followed him some 250 feet to the corner of a street, and again struck him. Nichols then ran home, calling for his knife, and stated that he would kill or fix O'Connell. Having procured a carving knife, he returned to the corner, where he and O'Connell instantly came together, and the latter was cut through the heart with the knife.

Upon the trial of Nichols, the plaintiff in error, for murder, he testified that upon his return he was attacked by O'Connell, and used the knife in self-defense. He then offered to show specific acts of violence committed by the deceased upon other occasions upon other people, and also to show

the character of the deceased to be bad, from general reputation for violence:

Held, that the court properly excluded the evidence tending to prove specific acts of violence upon other occasions, but erred in excluding that which tended to show that the general character of the deceased for violence was bad. (*Nichols* agt. *People*, 23 *Hun*, 165.)

19. The defendants, wholesale dealers in stoves, occupied the upper stories of a building in New York city for the storage of stoves, and received orders for and delivered them in the basement. An elevator, used by the defendants and other occupants of the building, ran from the upper story to the basement, and into a pit made in the floor thereof. The plaintiff, who had ordered some stoves in the morning, came in the afternoon to get them, and finding no one to attend to the matter in the basement, went to the elevator to call up to some one in the upper story, and in so doing fell into the elevator pit and was injured. The basement was dark, and there were no guards around the pit. The plaintiff had been there before and knew where the elevator was situated, but did not know of the existence of the pit. When there before, he had found a guard around the place where the elevator descended. In an action by him to recover damages for the injuries so sustained, *held*, that the question of the plaintiff's contributory negligence was properly left to the jury, and that a verdict in his favor would not be disturbed. (*Harris* agt. *Perry*, 23 *Hun*, 244.)

20. Upon the trial of an action for writing and publishing a libel concerning the plaintiff, the defendant, having testified as to certain statements made to him by the plaintiff, and as to his previous knowledge of his life and char-

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acter was asked, with a view of showing that he wrote the article with good motives and in the belief that it was true, "Why did you write it?"

Held, that the court erred in refusing to allow him to answer the question, as evidence that he acted in good faith was admissible, not in mitigation of the compensatory, but of the vindictive damages which a jury might award in such a case. (Bennett agt. Smith, 23 Hun, 50.)

21. Upon the trial of an action brought against the representatives of a deceased person, the plaintiff having been called as a witness in his own behalf, the counsel for the defendants, before the plaintiff had been sworn or given any testimony, objected to him "on the ground that he is (was) an interested party, and incompetent under section 829 of the Code of Civil Procedure." The objection was overruled, and the plaintiff having been sworn gave testimony as to personal transactions had with the deceased, without any specific objection thereto being made by the defendants:

Held, that the objection was invalid, as being too general, and that it was properly overruled by the court. (Hoar agt. Hoar, 23 Hun, 33.)

22. Upon the trial of an action brought by the administrator of a deceased payee of a promissory note against the makers thereof, one of whom claimed to be liable as a surety only and the other of whom interposed no defense, the latter was allowed, against the plaintiff's objection and exception, to testify in behalf of his co-defendant as to personal transactions and communications had by the witness with the deceased:

Held, that the testimony was inadmissible under sections 828 and 829 of the Code of Civil Procedure. (Hill agt. Hotchkin, 23 Hun, 414.)

23. The declarations and admissions of an agent are not admissible as against his principal, unless they were connected with or made in regard to a transaction then (at the time of the making of such declarations and admissions) being conducted by him for his principal. (Johnston agt. Thompson, 23 Hun, 90.)

24. Under section 829 of the Code of Civil Procedure a party cannot be examined as a witness in his own behalf against the administrator of a deceased person, as to any personal transaction or communication had by him with the deceased, unless the administrator has been examined in his behalf concerning the same transaction or communication. (Ward agt. Plato, 23 Hun, 402.)

25. In an action brought by an assignee in bankruptcy against a bank to recover a payment made to it, as having been made with intent to give a preference, and received by the bank with knowledge of the debtor's insolvency, the bank is chargeable with knowledge of all facts in regard to the debtor's intention and solvency which its president has acquired while acting in the capacity of president in its behalf. (Getman agt. Second Nat. Bank, 23 Hun, 498.)

26. What evidence is sufficient to establish such knowledge on the part of the president, considered. (*Id.*)

27. Evidence of a prisoner's good character is admissible in all criminal cases, and is to be considered by the jury, whether the evidence of the prisoner's guilt be doubtful and uncertain, or strong and conclusive, but in the latter case it is of comparatively little importance. (People agt. Moett, 23 Hun, 60.)

28. In May, 1876, one Terence Gratatan, the brother of the plaintiff's

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intestate, at the request of his employer, Jeffries, called upon one Dr. Mereness, a regularly admitted physician, at his office, and was carefully examined by the latter. Grattan took off his coat and vest, and the doctor percussed or auscultated him, had him inhale and exhale, listened at his back and heart, felt his pulse and asked him questions. At the close of the examination he told Grattan that he could not continue in his present business, and that he would not live long. Upon the trial of this action brought upon a policy of insurance issued by the defendant, in June, 1876, upon the life of the plaintiff's intestate, who died in February, 1879, Dr. Mereness was allowed, against the plaintiff's objection and exception, to testify as to this examination and to state that he then discovered that Grattan had a disease of the lungs, and to give the details thereof. The defense interposed by the insurance company in the action was that the intestate, in applying for the policy, stated that the health of his brother was good, and that he had never had pulmonary or other constitutional disease:

Held, that the evidence was inadmissible under section 834 of the Code of Civil Procedure, and that the court erred in receiving it. (*Grattan* agt. *Metropolitan Life Ins. Co.*, 24 *Hun*, 43.)

29. On January 13, 1878, one Eliza Houseworth, being sick of a disease from which she died on February seventh, delivered to the defendant Baker certain securities, and directed him to apply the income and, if necessary, the principal thereof to the support of her husband during his life, and upon his death to divide what was left between the plaintiffs. On January twenty-seventh the husband died, and between that time and February seventh she altered the arrangement as to the said fund, and directed Baker to apply a por-

tion thereof to other purposes, which he did. In this action, brought by the plaintiffs to recover the whole of the fund, the defendant Baker claimed to be allowed for the amount expended by him in pursuance of the last direction of the deceased, and the other defendants, the administrators of Eliza Houseworth, claimed to be entitled to the whole fund received by Baker.

Upon the trial Baker was called by the plaintiffs, and allowed, against the objection and exception of the other defendants, to testify as to the said transactions with the deceased, and as to what she then said to him:

Held, that the evidence was inadmissible under section 829 of the Code of Civil Procedure. (*Wilkins* agt. *Baker*, 24 *Hun*, 32.)

30. In this action, brought to recover a triangular strip of land, it appeared that the plaintiff had in 1856 contracted, by a sealed instrument, to convey about twenty-five acres of land (including the strip in question), part of a larger tract of fifty acres, to one Nehemiah Shannon, who agreed to pay a mortgage covering the whole fifty acres, as a part of the purchase-money. Thereafter, the mortgage was conveyed to Shannon's wife, who foreclosed it by advertisement, and bought in a part of the fifty acres for the full amount due; the part so purchased being substantially that covered by the contract, except that it was claimed that the description did not include the strip in question. Upon the trial, evidence was received, against the plaintiff's objection and exception, to show that Nehemiah made the contract as the agent for, and in behalf of his wife, who thereafter entered into possession of the premises with him, and that the amount due upon the contract had been fully paid to the plaintiff:

Held, that the evidence was properly admitted.

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That the plaintiff could not recover the land. (*Carley* agt. *Potts*, 24 *Hun*, 571.)

31. Upon the trial of this action of ejectment, two leases were produced on behalf of the plaintiff, one dated in 1808 and the other in 1815. A witness, called by the plaintiff, gave evidence tending to show that the witnesses to the leases were dead; that, from an inspection of many early leases of the same character, he had become familiar with their signatures and thought them to be genuine; that the lessor was dead; that he had seen him write, and believed his signature to be genuine. An objection to the admission of the leases, made by the defendant, on the ground that there was no proof of their execution or delivery, was overruled:

Held, error; that there was no such proof of possession under, or as to the custody of the leases, as to authorize their admission in evidence as ancient records. (*Martin* agt. *Rector*, 24 *Hun*, 27.)

32. In an action to recover damages for an injury sustained by the plaintiff in falling over a water-gate projecting from the sidewalk in one of the streets of the defendant, a witness for the plaintiff having testified that he knew of the existence of the water-gate at the place where the plaintiff fell, for some year and a-half before the accident, was asked, "Did you ever know of anybody falling over there before?" Upon the defendant's objecting that the evidence was immaterial and irrelevant, the court excluded it:

Held, that this was error. (*Burns* agt. *City of Schenectady*, 24 *Hun*, 10.)

33. *Held*, further that the defendant could not insist upon the appeal that the evidence was properly rejected on the ground that it did not appear when such other falls had occurred, or that the condition

of the water-gate was the same as at the time of the accident, as such grounds of objection were not stated at the trial. (*Id.*)

34. In this action brought to recover damages resulting from alleged fraudulent representations made by the defendant to the plaintiff, each party was, upon the application of his adversary, examined as a witness before the trial. Before the trial the defendant died and the action was continued against his executors:

Held, that upon the trial the plaintiff was entitled to introduce in evidence his own examination, taken at the instance of the defendant, and that the same was not rendered inadmissible by section 829 of the Code of Civil Procedure. (*Rice* agt. *Motley*, 24 *Hun*, 143.)

35. In proceedings to compel a husband to provide for the support of his wife, whom he had threatened to abandon, the woman testified that she had been married to him for eight years; that during that time he had lived with her, introduced her to his relatives and acquaintances, and recognized her as his wife. Upon cross-examination she testified she was not married by any person, but that the defendant had always acknowledged her as his wife, and that they had always lived together as husband and wife:

Held, that the evidence was sufficient to establish a marriage in fact. (*People ex rel. Commissioners* agt. *Bartholf*, 24 *Hun*, 272.)

36. *Held*, further, that the wife was competent witness to prove the fact of marriage. (*Id.*)

37. The plaintiff was, against the defendant's objection and exception, allowed to testify in an action on an insurance policy, that he did not read the policy when it was delivered to him:

Held, no error; that it tended to

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show that he relied on the agent's acts. (*Miaghan* agt. *Hartford Fire Ins. Co.*, 24 *Hun*, 58.)

38. Under section 2 of chapter 182 of 1876, a wife cannot, though willing so to do, be allowed to testify against her husband upon his trial for bigamy. (*People* agt. *Haughton*, 24 *Hun*, 501.)

39. In an action for conversion the value of the articles must be proved, whether denied in the answer or not. (*Starr* agt. *Cragin*, 24 *Hun*, 177.)

40. Where the plaintiff has testified in her own behalf, the defendant should be allowed to prove statements made by the plaintiff that she would get even with both the defendant and her husband. (*Id.*)

41. For the purpose of proving title in the state, the state map, showing the lines of the state lands, was introduced:

Held, that this was sufficient *prima facie* to show such title (*Sec. 5, chap. 451, Laws of 1837*). (*Carpenter* agt. *City of Cohoes*, 81 *N. Y.*, 21.)

42. To secure the joint bond of a husband and wife they executed their mortgage to C. upon lands owned by the wife alone. She thereafter conveyed the mortgaged premises to her son, who, in an action to foreclose the mortgage, brought by an assignee of the mortgagee, interposed the defense of usury; the mortgagors did not defend. The mortgagee died previous to the trial. This took place in 1878, when the original section 830 of the Code of Civil Procedure was in force, which provided in substance that where a party cannot be examined as a witness concerning a transaction with a deceased person under section 829, the husband or wife of said party cannot be examined concerning the same transaction. Upon the trial the

son called his father, who negotiated the loan with the mortgagee, as a witness solely in his own behalf to prove the usury:

Held, that as the mother, to whose title the son succeeded, would have been precluded from testifying in his behalf as to the transaction with the deceased, the testimony of the father was properly excluded. (*Whitehead* agt. *Smith*, 81 *N. Y.*, 151.)

43. As to whether such testimony falls within the prohibition of section 829, *quære*. (*Id.*)

44. In an action against attorneys, to recover for the services of a stenographer, plaintiff offered to show that at the time of an interview between defendants and the stenographer, after the services were performed, in reference to the bill, defendant's client had escaped from prison and that the newspapers contained the announcement of his escape. The evidence was objected to and excluded:

Held, no error. (*Bonyng* agt. *Field*, 81 *N. Y.*, 159.)

45. Plaintiff offered to prove previous dealings of the stenographer with defendants when services were performed on like retainers, bills furnished to defendants, and payments made by them:

Held, that the testimony was properly rejected. (*Id.*)

46. In an action to recover a balance of the purchase-price of plaintiff's interest in certain grist mill property, the question at issue was as to whether a mortgage, executed by a third person to plaintiff at the time of the conveyance was received by him as payment or as security merely. The evidence, on the trial as to this was conflicting. Plaintiff testified that when the proposition to give the mortgage was made he objected, that defendant represented it to be good and ample security, that "the farm was worth it;" that he finally took

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it as security; that a prior mortgage was thereafter foreclosed and the farm brought only enough to pay it. After evidence had been given on the part of defendant tending to show that the mortgage was given in payment, he was allowed to give evidence under objection and exception, to the effect that at the time the mortgage in question was given the mortgaged premises were worth more than the amount of the two mortgages:

Held, no error; that the testimony was competent in answer to and explanation of plaintiff's evidence; and that it was no answer to this, that such evidence came out necessarily as a part of his case. (*Wallis* agt. *Randall*, 81 N. Y., 164.)

47. A witness for the defendant was permitted to give testimony under objection and exception to the effect that the contract in question was abandoned and a new verbal contract was made, and that under this the balance of the purchase-price was to be paid by the mortgage:

Held, no error. (*Id.*)

48. *It seems* that it is incompetent for a witness to testify as to what another person did or did not understand from a transaction. (*Id.*)

49. Plaintiff offered in evidence a letter written to him by P., who made the purchase in question jointly with defendant, and who was named as defendant, but was not served with process, written several years after the contract in question, and containing statements tending to sustain plaintiff's claim. This was objected to and excluded, the court holding that it could only be used for the purpose of contradicting and discrediting P. as a witness:

Held, no error; that defendant could not be affected by such declaration of P. as they were not partners and P. was in no sense agent of defendant. (*Id.*)

50. A judgment by default in ejectment is not conclusive against persons claiming under the defendant, unless it has been for three years docketed in the office of the clerk of the court in which it was rendered (2 R. S., 309, sec. 38). (*Sheridan* agt. *Linden*, 81 N. Y., 182.)

51. A policy of fire insurance contained a condition avoiding it, in case the building became "vacant and unoccupied." It was left temporarily unoccupied, but not vacant. The policy also contained a condition avoiding it in case of the increase of risk "internally or externally," unless proper notice thereof in writing was given. Upon the trial of an action upon the policy, defendant offered to show that the risk was increased by the non-occupancy; this was excluded:

Held, no error; that as the policy contained express conditions as to vacancy and occupancy, and as to the mode in which and purposes for which the house was to be used, it was not to be presumed that the general condition was intended for any of the cases thus specially provided for; and so, that if the risk was thus increased the condition was not violated. (*Herrman* agt. *Mer. Ins. Co.*, 81 N. Y., 185.)

52. A general objection to a question calling for an opinion as to the existence of a fact will not sustain an exception to the reception of the testimony where the fact is material; the objection should be put upon the ground that the fact could not be thus proved. (*In re Crosby* agt. *Day*, 81 N. Y., 242.)

53. In an action for slander plaintiff gave evidence tending to show that the defendant accused her of having had a venereal disease. Evidence was given on the part of defendant tending to show improper intimacy between plaintiff and one W. Defendant offered proof that a son of plaintiff made statements at his, defendant's

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house, to the effect that W. had the disease spoken of:

Held, that it was properly excluded, as it did not tend to prove the charge made to be true, or that defendant had information or had heard reports which should *per se* have led him to believe that they were true. (*Hatfield* agt. *Lasher*, 81 N. Y., 246.)

54. Defendant D. executed to plaintiff an assignment under seal of a bond and mortgage, which contained a guaranty of payment of the amount secured in case of the failure of the mortgagors to pay. In an action to foreclose the mortgage, D. was sought to be charged with any deficiency. He alleged and offered to prove that at the time of the execution of the assignment, plaintiff, in consideration of being permitted to retain \$300 out of the purchase-money and of the assignment to him of a policy of insurance upon a building on the premises, agreed by parol to keep the building insured until the mortgage became due, that she did not do this, and that the building was destroyed by fire. The evidence was objected to and excluded:

Held, error; that the rule excluding parol evidence varying or modifying written instruments did not apply, as the agreement sought to be proved was an independent collateral engagement upon a new consideration which, if established, would not qualify or change the guaranty, but simply gave a right of action available as a counterclaim. (*Van Brunt* agt. *Day*, 81 N. Y., 251.)

55. In an action to recover damages for an alleged conspiracy to break up the business of a firm, and of a levy on the interest of one party an execution on judgment confessed by him defendants proved that prior to the levy under the execution the property of the firm had been seized under an attachment, and the attachment was

given in evidence. Plaintiff was allowed, under objection and exception, to give in evidence the answer in the attachment suit:

Held, error. (*Neudecker* agt. *Kohlberg*, 81 N. Y., 296.)

56. In an action upon a promissory note, where the defense was usury, on the cross-examination of the payee of the note, who was called by plaintiff to prove that the note was an accommodation one, evidence was received under objection and exception that he had negotiated other notes of the defendant, which he stated at the time to be business paper:

Held, no error; also, *held*, that evidence of the transfer of other similar notes, to which were attached written declarations of defendant that they were business paper, was competent. (*Bayliss* agt. *Cockcroft*, 81 N. Y., 364.)

57. After the receipt in evidence of written certificates signed by defendant and the payee, attached to other similar paper, to the effect that they were business paper, plaintiff was allowed to prove, under objection and exception, statements of the payee when transferring the paper to the same effect as the certificates:

Held, that if erroneous, the error could have done no harm, as it was but a repetition, in a feebler way, of the declarations furnished by defendant to the payee to be used by him. (*Id.*)

58. Plaintiff was allowed to testify, under objection and exception, that he believed in the truth of a certificate required of and given by defendant to the effect that the note in suit was business paper, and that he had no intention to use it to evade the statute of usury:

Held, no error. (*Id.*)

59. A chattel mortgage, executed by the firm of which F., the payee of the note, was a member, to de-

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fendant, conditioned for the payment of a sum of money absolutely, was offered in evidence; this was objected to as irrelevant and immaterial; the objection was overruled:

Held, no error; that it was competent, if connected with the note in suit, as if given for it, it was a good consideration, and if plaintiff failed to make such connection, defendant should have moved to strike it out. (*Id.*)

60. In an action for malicious prosecution, wherein plaintiff alleged that defendants caused him to be arrested under a charge of stealing a deed from defendant K., plaintiff, as a witness in his own behalf, after stating the manner in which he obtained the deeds from K., and the fact that she afterward brought a suit to set aside a subsequent conveyance of the premises made by him, was asked if he made an offer in court in that case in the presence of K., to convey the premises upon being paid the expense he had been put to; this was admitted under objection and exception, and plaintiff answered in the affirmative:

Held, that the testimony was improperly received. (*Thaule agt. Krekeler*, 81 N. Y., 428.)

61. K., as a witness in her own behalf, was asked if plaintiff, about the time the charge was made by her, had deeded the property to another person; this was objected to and excluded:

Held, error; that the evidence bore directly upon the motives of plaintiff in getting possession of the deeds and the grounds which defendant had for the suspicions stated in her affidavit, and upon the existence of probable cause. (*Id.*)

62. The courts of this state will not take judicial notice of any laws of another state not according to the common law. (*Harris agt. White*, 81 N. Y., 543.)

63. Accordingly, *held*, that as it was not illegal at common law to make a bet or wager on the result of a horse-race, an agreement to drive a horse in a contest of speed for a wager or stakes, or for a purse, prize or premium in another state was not *prima facie* illegal or against the policy of this state. (*Id.*)

64. In an action between copartners, R. was, on July 9, 1874, appointed receiver of the partnership assets, and upon that day entered upon the performance of the duties of the trust. On January 30, 1875, he gave a bond with defendant as his surety, conditioned that he would "henceforth faithfully discharge the duties of his trust." R. was subsequently removed as receiver, and plaintiff appointed in his place. Upon the accounting of R., to which defendant was not a party, R. was ordered to pay over to plaintiff a sum which was adjudged to be the balance of the trust funds in his hands. This order R. did not obey. In an action upon the bond it did not appear when the deficiency or misappropriation of the funds occurred. Defendant offered to show that no liability accrued after the date of the bond. The evidence was objected to and excluded:

Held, that the order was not conclusive upon defendant, and the rejection of the proof offered was error. (*Thomson agt. MacGregor*, 81 N. Y., 592.)

65. When the pleadings give notice to a party to be prepared to produce a writing, if necessary to contradict the evidence of the opposite party, secondary evidence of the contents of the writing may be given by the latter without further notice. (*Lawson agt. Bachman*, 81 N. Y., 616.)

66. Where the holder of a promissory note parts with the possession thereof to the maker, it is a personal transaction between them,

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within the meaning of section 399 of the Code of Procedure. (*Van Gelder* agt. *Van Gelder*, 81 N. Y., 625.)

67. The title of the assignee of a non-negotiable promissory note cannot be affected by declarations of the assignor, made after the assignment. (*Id.*)

68. L., a detective employed by defendants to procure evidence against plaintiffs, after the commencement of the action, and while engaged in taking evidence on commission of a witness in behalf of defendants, saw certain signatures which plaintiff M. (the alleged widow) admitted to be her genuine signatures. L. was called as a witness to prove the signature of M. to a lease, executed in another name while she claimed to be the wife of deceased. The evidence was rejected:

Held, that L. showed sufficient knowledge to authorize him to give an opinion; but that the case could not be distinguished from that of genuine writings furnished to a witness to enable him to become a witness; and so that the rejection of the evidence was not error. (*Hynes* agt. *McDermott*, 82 N. Y., 41.)

69. The method and the sufficiency of proof of foreign laws considered. (*Id.*)

70. In an action to recover for services rendered to defendants' testator by the wife of plaintiff, who was the adopted daughter of the testator, the defense was that the services were rendered under an agreement that they were to be compensated for by gifts to plaintiff and wife from the testator in his lifetime and by legacies in his will; after providing for the payment of debts, a legacy was given to the wife by the will, and one to her daughter, but of less amount than the debt. Defendants offered to prove declarations of the testator,

made at the time and to the person who drew the will, that he had made such an agreement and that said legacies were intended as a payment for the services:

Held, that the evidence was properly excluded, that a legacy implies a bounty, not a payment, and to permit extrinsic evidence of the declarations of the testator thus to change the import of the donative words would be to contradict by oral evidence the legal effect of the instrument and would violate the policy of the statute of wills; that the legal presumption that a legacy from a debtor to a creditor of a sum as great or greater than the amount of the debt was intended as a satisfaction did not apply; first, as the legacies are given "after payment of debt;" second, they were of less amount than the debt; third, the debt was unliquidated; fourth, the legacies are not given to the creditor but to third persons. (*Reynolds* agt. *Robinson*, 82 N. Y., 103.)

71. Parol evidence of the intention of a testator is not admissible to fortify a legal presumption raised against the apparent intention, or to create a presumption contrary to the apparent intention where no such presumption is raised by law. (*Id.*)

72. In 1872 one D. was appointed by plaintiff agent for the sale of its sewing machines, on commission. He was to hold the machines consigned to him and the proceeds of sales, less commissions, as the property of plaintiff, to remit proceeds and deliver the machines in his hands when called for. In December, 1874, D. gave a bond, with defendant as surety, conditioned for the payment by D. of his indebtedness to plaintiff existing at the date of the bond, or which might thereafter be incurred by him on account (among other things) of his failure to account for merchandise consigned to him

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by plaintiff. At that date D. was indebted for a number of machines for which he had failed to account; this was not told to defendant, and he made no inquiries. It did not appear that D. had been guilty of any dishonesty. In September, 1875, defendant gave notice to plaintiff not to deliver any more machines on the credit of the bond. In an action upon the bond, defendant was held liable for the machines delivered to D. after the date of the bond and before the notice, for which he failed to account or to deliver on demand:

Held, that evidence of representations made by D. at the time he asked defendant to sign the bond, to the effect that he was not in default to plaintiff, was properly excluded. (*Hove Machine Co., agt. Farrington*, 82 N. Y., 121.)

73. In an action against a turnpike company for negligence, in placing beside the traveled part of its road a pile of stones for the purpose of making repairs, which had a tendency to and did frighten horses traveling upon the road, and for neglecting to remove the same after notice, H., defendant's secretary and treasurer, testified that he received the notice at an hour on a certain day, which it appeared was the day, and about the time of the accident. P., a witness for plaintiff, testified that he gave the notice four or five days before. The wife of P. was then called as a witness for plaintiff, and testified that she was with her husband on the day H. testified the notice was given, and was asked if P. did not state to defendant's gate-keeper on that day that he had given H. notice a week before. This was objected to as a hearsay; the objection was overruled and the witness answered in substance that P. stated he had given previous notice to H.:

Held, that the reception of the evidence was error, and fatal to the judgment. (*Eggleston agt. Col. Tyke. Co.*, 82 N. Y., 278.)

74. In an action of trespass the trespass complained of was the cutting and removing of timber:

Held, that evidence was properly received as to the value of the farm with the timber, and its value after it was cut; and that this difference furnished a proper measure of damages. (*Argotsinger agt. Vines*, 82 N. Y., 308.)

75. Upon trial of an indictment for assault and battery with intent to kill, the prosecution gave in evidence certain notes purporting to have been made or indorsed by H., the complainant, also a book of account; these the witness producing them testified came lawfully into his possession, at the prisoner's house, and in his presence. Testimony was then given by H. and others, showing that the signatures of H. to the notes were forged:

Held, that the evidence was properly received, as showing motive, although it tended to prove the commission of another crime. (*Pontius agt. People*, 82 N. Y., 339.)

76. The prosecution gave evidence of declarations of the prisoner, made two days before the alleged assault, while he was examining a note signed by H., tending to show an intimate acquaintance on his part with the signature of H.:

Held, competent. (*Id.*)

77. The account book received in evidence contained the handwriting of the prisoner:

Held, that it was proper to permit the jury to examine the entries in said book, and to compare them with the alleged forged notes. (*Id.*)

78. The prisoner was examined at length in his own behalf, asserting the genuineness of the notes, and that they were made in payment of moneys loaned by him to H.:

Held, that it was competent to inquire on cross-examination as to the sources from whence the

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prisoner procured the money to make the loans. (*Id.*)

79. Also, that it was necessary for the prosecution to prove any facts tending to show the improbability of the prisoner's statement, *i. e.*, his pecuniary necessities, the borrowing of money by himself, at or about the time of the alleged loans, the non-payment of small debts when due, after frequent requests, etc. (*Id.*)

80. In an action by plaintiff as assignees of common carriers of the freight on a cargo of staves shipped by defendants from T, to N. Y., plaintiffs, for the expressed purpose of proving ownership of the cause of action, offered in evidence the bill of lading, executed about six years before the trial, indorsed by the carrier to a bank as security for plaintiffs' acceptance and payment of an accompanying draft; also with an indorsement thereon, signed by the bank and directed to plaintiffs, as follows: "Upon your acceptance of the draft the bill of lading is placed in your custody to collect and apply the first proceeds in payment of the draft." This evidence was rejected. Plaintiffs also offered to prove by parol an acceptance which was rejected:

Held, error; that the presumption from the possession of the draft was that plaintiffs had complied with the condition precedent, *i. e.*, the acceptance of the draft; that, although plaintiffs could not be charged as acceptors without showing a written acceptance, yet, as defendants were not parties to the draft, or privies, and the fact of acceptance was collateral to the issues herein, it might be proved by parol. (*Sprague* agt. *Hosmer*, 82 N. Y., 466.)

81. In an action to charge defendant as trustee of a manufacturing corporation, because of failure of the corporation to file an annual report, defendant offered to prove

that after his term of office had expired, and before the debt to plaintiff was contracted by the corporation, he filed his petition in bankruptcy, including in his list of assets his stock in the corporation; that he was adjudged a bankrupt and assigned and delivered said stock to the assignee and received his discharge, and that after the filing of the petition he had no connection with the corporation. This offer was rejected:

Held, error; that the bankruptcy proceedings were circumstances bearing upon and explaining the fact that defendant had ceased all connection with the corporation; and so that proof thereof was competent, and the offer was not too broad. (*Phil. & R. C. & I. Co.* agt. *Hotchkiss*, 82 N. Y., 471.)

82. A deed acknowledging the payment of the purchase-money is *prima facie* evidence that the grantee was a purchaser in good faith, for a valuable consideration within the recording act. (*L. F. Co.* agt. *L. G. & F. Co.*, 82 N. Y., 476.)

83. Plaintiff and defendants, S. and M., were joint-owners of certain letters patent which they believed to be valid; an agreement was entered into between the parties to the effect that defendants should have the exclusive right to manufacture and sell the patented article in consideration of certain royalties which they agreed to pay plaintiff. In an action to recover royalties accruing under the contract from October 1, 1869, to January 1, 1873, defendants offered to prove that on December 8, 1869, the patent office declared an interference between the patentee and one G. respecting the invention, and that on January 19, 1871, a decision was made by that office declaring G. to be the first and original inventor, awarding priority to him, and directing the issue of a patent to him. This evidence was objected to and excluded:

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Held, error; and that had the facts so offered to be proved been established, plaintiff would not have been entitled to recover royalties accruing after the date of such decision. (*Marston agt. Swett*, 82 N. Y., 526.)

84. *It seems*, that it is only a final judgment upon the merits which is competent as evidence and conclusive in a subsequent action between the same parties or their privies. (*Webb agt. Buckelew*, 82 N. Y., 555.)

85. An interlocutory order is not such a judgment. (*Id.*)

EXAMINATION OF PARTY.

1. To authorize the granting of an order for the examination of a party before trial, the affidavit must specify the facts and circumstances showing the testimony of the party to be material and necessary. It is not sufficient to allege that the testimony is material and necessary for the party making the application, and the prosecution of the action and that the applicant cannot safely proceed to trial without examining him. What statement of facts is insufficient. (*Crooke agt. Corbin*, 23 Hun, 176.)

2. An action was brought by the plaintiff, an employe of the "Eagle Mill," to recover damages for injuries alleged to have been occasioned by the negligence of the defendant, who was alleged to be its proprietor; this latter allegation being denied by the answer. After issue joined, the plaintiff applied for an order directing the defendant to appear and be examined, upon an affidavit stating the facts above mentioned, and that the testimony of the defendant was material and necessary to enable her to prove her cause of action, and stating that she desired to prove what interest the

defendant had in the said Eagle Mill, and to ascertain whether the said mill was a corporation or a copartnership:

Held, that the affidavit was sufficient and that the order should have been granted. (*Sweeney agt. Sturgis*, 24 Hun, 162.)

3. Where the affidavit, presented upon an application for an order for the examination of a party before trial, contains all the facts which the Code of Civil Procedure and the general rules require to be stated therein, it is imperative upon the judge to grant the order. (*Id.*)

EXECUTION.

1. June 15, 1860, the plaintiff's attorney, issued an execution upon a judgment recovered on that day against the defendant, which was on August 5, 1860, returned unsatisfied. On April 16, 1877, the same attorney, without any application to the court, issued a second execution upon the judgment, indorsed by him as the plaintiff's attorney, under which certain premises belonging to the defendant were, on June 8, 1877, sold, and thereafter, and in September, 1878, conveyed to the purchasers. The plaintiff died in February, 1870, and letters of administration were duly issued upon his estate. Prior to his death he had assigned the judgment to his attorney as security for certain costs owing to him.

Upon an application, made by persons who had purchased the premises from the defendant shortly before the issuing of the second execution, to vacate and set it aside, together with all the proceedings had thereunder:

Held, that the execution was irregularly issued and that the application should be granted. (*Duryee agt. Botsford*, 24 Hun, 317.)

2. That the question as to whether

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or not the conveyance to the applicants was made with the intent to defraud the creditors of the judgment debtor could not be determined upon this application. (*Id.*)

3. December 9, 1874, an execution upon a judgment recovered in the supreme court of this state by the plaintiff against one Davis was delivered to the defendant who, on January 9, 1875, levied upon property of the debtor sufficient in amount to satisfy the same. On January 12, 1875, all proceedings on the execution were stayed by the United States bankrupt court, and on January twenty-first notice was served of a motion in the supreme court to set aside the judgment and execution, to be made at a term of the said court commencing on February first. On February third the motion was decided, and on February eleventh an order was entered opening the default but allowing the judgment to stand as security. On February twentieth a motion was made to settle the order, and on March fifth an order was made, in pursuance thereof, allowing the judgment to stand as security, but setting aside all proceedings subsequent thereto. The term of the court continued from February first to March fifth. On February third the defendant, under a mistake as to his duty under the stay, returned the execution unsatisfied.

The stay having been set aside in December, 1876, this action was brought by the plaintiff, in 1877, for the wrongful return of the execution:

Held, that the rights acquired by the plaintiff by the levy were subject to be divested by any subsequent act of the court in setting aside the judgment or execution. (*May* agt. *Cooper*, 24 *Hun*, 7.)

4. That the order of March fifth related back to and operated for the

protection of the defendant as of February first, the beginning of the term, or, at the very latest, as of February third, the day on which the decision was made. (*Id.*)

5. That the plaintiff had suffered no damage by reason of the defendant's acts and that the action could not be maintained. (*Id.*)
6. The defendant in this action having been arrested by the sheriff under an execution against his person, issued upon a judgment recovered against him, the plaintiff served upon the sheriff the following notice: "You are hereby authorized and requested to release and discharge from imprisonment the defendant Albert Falk, in the above entitled action, upon his paying and satisfying all your legal fees, charges and expenses, under and upon the orders of arrest and execution herein under which the defendant Albert Falk is now in your custody:"

Held, that the sheriff was entitled to his poundage upon the execution, and that the defendant was not entitled to be released from custody until he had paid the same. (*Ryle* agt. *Falk*, 24 *Hun*, 255.)

7. Where upon the hearing of a motion to set aside an execution because issued for the first time more than five years after the entry of the judgment, it appears that the facts are such as would have required the court to have granted leave to issue it, if an application therefor had been formally made, it is not an abuse of judicial discretion for the court to refuse to set it aside. (*Frean* agt. *Garrett*, 24 *Hun*, 161.)
8. *Quære*, as to what constitutes the return of an execution "unsatisfied or unexecuted," as those terms are used in section 1377 of the Code of Civil Procedure. (*Id.*)

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9. The purchaser of lands on sale under execution, after the expiration of a year from the day of sale without redemption, acquires an equitable title, which entitles him to maintain an action for the cancellation of instruments which, within the definition of courts of equity, are clouds on title. (*Rem. Paper Co. agt. O'Dougherty*, 81 N. Y., 474.)

10. Where a mortgage or a judgment, which has been paid, is continued as an apparent lien for inequitable purposes, as for defrauding creditors, an action is maintainable by a purchaser on execution sale of lands, so apparently incumbered, to compel its satisfaction of record. (*Id.*)

EXECUTOR.

1. Where an action is brought upon an instrument executed by a person as executor and trustee under a last will and testament, an allegation that such person as executor of such last will and testament executed the instrument is sufficient, though where one sues as executor the rule is different, in which case he must aver his appointment and title as such, in particular. Or where the action is brought to recover a debt due to or from a testator, an allegation is necessary showing the appointment of the executor, or administrator, as such, with all necessary details to make that act apparent (*Affirming S. C.*, 58 How., 1). (*Kingsland agt. Stokes*, ante, 494.)

EXTRA ALLOWANCE.

1. In an action to restrain the recognition of a claim to an office, the defendants, upon plaintiff's default, on the case being called for trial, on notice, was granted an extra allowance:

Held, that the action was not

one in which, under the Code, the court had power to grant an allowance; and that though the general notice of trial is sufficient notice for an application for an allowance upon a trial in cases where the law provides for an allowance, this being no case for an allowance, the order, though granted by default, is appealable. (*Voorhis agt. French*, ante, 161.)

2. The word "involved," as used in section 3253 of the Code of Civil Procedure, means "affected." (*Williams agt. Western Union Telegraph Company*, ante, 305.)

3. Where the plaintiff claimed that the defendant, the Western Union Telegraph Company, had no legal right to the property of the American Union Telegraph Company, and the defendant claimed it was the legal owner of the property, and the court sustained its claim:

Held, that the title of the defendant to this property was affected by this judgment, and an extra allowance to defendant may be computed upon the value of such property, as "the subject-matter involved." (*Id.*)

4. The fact that plaintiff, on obtaining an injunction, gave an undertaking to pay damages suffered by the party enjoined if the injunction should not be sustained, does not deprive defendant of the right to an extra allowance, though such allowance may be considered by the court on the assessment of damages upon the undertaking. (*Id.*)

5. The fact of the entry of judgment is not a waiver of the right to costs and allowances, though an extra allowance cannot be granted after the taxation and entry of costs in a judgment. (*Id.*)

6. In an action brought by a judgment creditor to set aside a conveyance of land made by the defendant, on the ground that it was

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made with intent to hinder, delay and defraud his creditors, in which action the plaintiff succeeds, an extra allowance granted by the court must be based upon the amount due to the plaintiff upon his judgment, and not upon the value of the land. (*Potter* agt. *Farrington*, 24 *Hun*, 551.)

7. In an action to compel the defendant to lower the height of a dam and to recover the damages already occasioned thereby, any extra allowance which may be granted in the action must be computed upon the amount of the damages allowed, and not upon the value of the plaintiff's property. (*Rothery* agt. *N. Y. Rubber Co.*, 24 *Hun*, 551.)
8. An application for an additional allowance can only be made to the justice before whom the trial was had. (*Hun* agt. *Salter*, 24 *Hun*, 640.)

FALSE IMPRISONMENT.

1. T. and Y., in a suit against N. and M., held them to bail on a provisional order of arrest, but after judgment, without taking the debtors in satisfaction, caused their arrest under a Stilwell warrant. After the latter proceedings had been dismissed — because plaintiffs having elected to proceed under the provisions of the Code, could not take proceedings under the Stilwell act, and the decision had been affirmed by the general term, and while a further appeal was pending — N. brought this action against T. and Y. for false imprisonment and malicious prosecution:

Held (reversing judgment for plaintiff): 1. That the two causes of action being inconsistent, and could not, therefore, be joined in one action, plaintiff should have been required to elect under which count he should proceed.

2. It being incumbent on plain-

tiff, in order to make out a cause of action for malicious prosecution, to show that there was a want of probable cause for the warrant, and as the plaintiff had given no evidence on his part to establish any such cause of action and had objected to any evidence of the existence of probable cause, the complaint as to this cause of action was properly dismissed.

3. The complaint for a malicious prosecution should have been dismissed also, because no such action is maintainable unless plaintiff avers and proves that the suit or prosecution was determined in his favor, while, when this action was brought the proceedings under which the arrest had been ordered were not terminated, as an appeal was then pending.

4. As to the remaining count, for false imprisonment, the complaint should have been dismissed, the process under which the plaintiff had been arrested being regular, and the arrest under it lawful; and the discharging of the warrant because the plaintiff should not be allowed to resort to two remedies, did not render the warrant and the proceedings under it void. (*Nebenzahl* agt. *Townsend*, ante, 353.)

2. The plaintiff was arrested on November 15, 1876, under a Stilwell warrant, and was released from custody on giving bonds for his appearance. The warrant was dismissed and set aside on February 3, 1877. The general term, on January 7, 1878, reversed such dismissal and ordered that the proceedings "be and the same hereby are revived and restored." At the close of the revived proceedings, a new order was made that defendant (plaintiff here) be rearrested. The new warrant was never served, the court of appeals having, in April, 1879, reversed the order directing it, and pronounced the original arrest illegal. The plaintiff, in July, 1879, began this action for false imprisonment:

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Held, 1. That plaintiff's imprisonment ended on the vacation of the Stilwell warrant in February, 1877, and his cause of action for false imprisonment was then complete; and not having been brought within the two years limited by the statute, was wholly lost.

2. The plaintiff having, after the revival of the proceedings, voluntarily appeared, no compulsion being used, and by his appeal to the courts having prevented his threatened rearrest, there was no new imprisonment; and the proceedings following his discharge in February, 1877, did not amount to a continuance of the original imprisonment.

3. If the plaintiff had sued for a malicious prosecution, either by itself or in addition to his claim of false imprisonment, the result might have been different. (*Dusenbury* agt. *Keiley*, ante, 408.)

3. *Quære*—Could this action be maintained against the defendant as receiver? in other words, in his official capacity; as the acts of the receiver, as such receiver, are the acts of the court, and as such the court cannot commit an assault and battery or false imprisonment. (*Id.*)

4. August 5, 1876, the plaintiff having been adjudged guilty of a contempt, in proceedings supplementary to execution, was imprisoned upon an order of the county judge, fining him and committing him to jail; on August 10th he gave an appeal bond, and was released. On January 25, 1877, the order of the county judge was reversed, and on January 9, 1879, this action for false imprisonment was commenced:

Held, that the right of action accrued upon his release, upon giving the appeal bond in August, 1876, and that the action was barred because not commenced within two years from that time. (*Van Ingen* agt. *Snyder*, 24 *Hun.*, 81.)

FEES.

1. A referee appointed "to sell real property, pursuant to a judgment in an action," other than an action to foreclose a mortgage, is entitled to the same fees as those allowed to the sheriff. (*Maher* agt. *O'Conner*, ante, 103.)

2. Under section 3307, subdivisions 7 and 11, of the Code of Civil Procedure, the sheriff is entitled to two and one-half per cent upon the sum recovered, not exceeding \$250, and one per cent upon the residue. (*Id.*)

3. The referee is also entitled, under section 3297 of the Code of Civil Procedure (upon distribution), to one-half of an executor's commissions. But he is only entitled to these commissions upon such of the proceeds as he actually distributes or applies. (*Id.*)

4. Where a party at the commencement of a reference stipulates with the opposite party to pay half the referee's fees, such stipulation will be enforced (*Following Fischer* agt. *Raab et al.*, 56 *How.*, 218-223; and *Bloodgood* agt. *Bloodgood*, 59 *How.*, 42). (*Brick* agt. *Fowler*, ante, 153.)

5. Whilst an action of divorce is pending, and before judgment, the husband may be required to furnish money to enable the wife to pay the fees of the referee and take up the report. (*McQuien* agt. *McQuien*, ante, 280.)

6. But after judgment of divorce has been rendered the court has no power summarily to compel the husband to furnish the wife the means to carry on a new litigation. (*Id.*)

7. If the husband does not pay the money which the judgment of divorce awards for the support of the wife she may resort to the remedies provided by sections 1772

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and 1773 of the Code of Civil Procedure. In prosecuting those remedies the divorced wife cannot look to her former husband to advance the means of carrying on proceedings to enforce the judgment. (*Id.*)

8. Where an absolute divorce was granted to the wife and a certain amount a year alimony was awarded to her, a portion of it being paid the first year, and the second year but a small portion being forthcoming, she instituted proceedings to compel its payment, and the court directed a reference to ascertain the amount of alimony due. The defendant failing to appear for cross-examination, an adjournment was granted on his stipulating to pay the referee's fees for the sitting and twenty-two dollars. On the adjourned day, the stipulation not being complied with, the defendant's direct testimony was stricken out and the referee reported in favor of plaintiff. Motion was made by plaintiff that defendant be compelled to pay the referee's fees on taking up the report; and defendant moved that the matter be sent back to the referee:

Held, that the motion to compel the husband to pay the referee's fees should be denied.

Held, further, that if the defendant will pay the referee's fees, and the twenty-two dollars which his counsel agreed to as the terms of the adjournment, the matter will be remitted to the referee, otherwise the motion will be denied. (*Id.*)

9. There is no question as to the right of the court to award to the receiver compensation out of the fund which he holds, even though the title to that fund be found to have been from the first and to be now in the defendants. The receiver's compensation cannot be made to depend upon the result of the litigation. (*Hopfensack* agt. *Hopfensack*, ante, 498.)

10. He is the officer of the court who takes property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party who shall ultimately be found to be entitled to it. Although it may sometimes happen, that by the unfounded claim of a plaintiff, the rightful owner of property is deprived temporarily of the possession of it, and that when he gets it back it is encumbered with the charges of the receiver to whom the court has given the care of it pending the litigation; yet great as may be the misfortune to the owner he must bear the loss unless he can obtain redress from the party on whose application the receiver was appointed. (*Id.*)

11. Where the appellants were defendants charged with having property belonging to the co-partnership, to which they got no title because of the fraudulent character of the transfer to them, and the court by its receiver took the disputed property into its custody to abide the determination of the action, there being no other fund from which the receiver's legal fees and expenses are payable, he is entitled to them out of the fund in his hands, *i. e.*, the property in dispute, no matter to which of the parties to the action possession of such property has been adjudged. (*Id.*)

12. The fees of referees in foreclosure actions must still be taxed under chapter 569 of the Laws of 1869, as amended by chapter 192 of the Laws of 1874, those enactments not having been superseded by the Code of Civil Procedure. (*Lockwood* agt. *Fox et al.*, ante, 522.)

FINDINGS OF LAW AND FACT.

1. Under the provision of the Code of Civil Procedure (*sec.* 993), which provides that a refusal to make any finding whatever upon

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a question of fact, on a trial by the court or a referee, where a request was seasonably made, is a ruling upon a question of law, a refusal of a request to find a fact, on the ground that the fact is immaterial, presents a question of law, and if the fact be material the ruling is error, although the fact be not conclusively proved, and the evidence as to it is conflicting. (*James agt. Cowing*, 82 N. Y., 450.)

2. No fact can be considered for purpose of reversing judgment entered on decision of court or report of referee, unless stated in findings or requested to be found on uncontroverted evidence. (*See Thomson agt. Bank of British No. Am.*, 82 N. Y., 1.)

3. Where tender of amount claimed in complaint is alleged in the answer, but no tender of costs is alleged, plaintiff may accept averments of answer and more for judgment on pleadings, in which case no findings of fact are required, and the order for judgment is a sufficient decision in writing under section 1010 of Code of Civil Procedure. (*See Eaton agt. Wells*, 82 N. Y., 576.)

FOREIGN JUDGMENT.

See ARREST.

Baxter agt. Drake, ante, 365.

See COMPLAINT.

De Nobile agt. Lee et al., ante, 272.

FRAUDULENT CONVEYANCE.

1. The defendants, who were partners and joint debtors and were insolvent, conveyed each his individual real estate, without actual consideration being paid, and then made a general assignment for the benefit of creditors:

Held, that though the assignment is valid, the conveyances are fraudulent and void, and cannot be upheld as made to provide for debts of the grantors, for a want of conformity to the provisions of chapter 466 of the Laws of 1877, which apply to "conveyances," as well as "assignments," made by a debtor. (*Royer Wheel Co. agt. Fielding et al.*, ante, 437.)

2. Also, that to establish the judgment creditor's lien on real estate no execution upon the judgment was necessary. (*Id.*)

3. Also, that it was no misjoinder of causes of action, to unite in the complaint, causes for the joint fraud, with those of the individual fraud of the defendants. (*Id.*)

GUARDIAN.

1. The appointment by a father, through his last will and testament, of a guardian for an infant child is effectual without the consent of the mother. (*Matter of Fitzgerald*, ante, 59.)

2. Chapter 172 of the Laws of 1862 requiring the consent in writing of the mother to such appointment is repealed by chapter 32 of the Laws of 1871. (*Id.*)

3. *Thompson agt. Thompson* (55 How., 494) approved. (*Id.*)

4. In all actions except partition summons must be served upon non-resident infant defendants by publication. (*Ingersoll agt. Mangam et al.*, ante, 149.)

5. A guardian can only be regularly appointed for an infant defendant after service of the summons personally, or by the substituted mode as prescribed. (*Id.*)

See PRACTICE.

Jessurun agt. Mackie et al., ante, 261.

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6. The supreme court has no jurisdiction to appoint a guardian for an infant where the infant is not within the jurisdiction, or domiciled there, and has no property therein. (*In re Hubbard*, 82 N. Y., 90.)

7. *It seems*, that if an infant is a resident within the jurisdiction, although not domiciled and having no property there, the court has power to appoint a guardian; so, also, property gives jurisdiction to appoint a guardian thereof, although the infant is out of the jurisdiction and a resident abroad. (*Id.*)

8. The bringing of an infant, however, into this state by stratagem for the purpose of giving jurisdiction, will not avail. (*Id.*)

HUSBAND AND WIFE.

1. Though a husband, whose wife leaves him while insane, would have been liable at common law to any one who should have supplied her with necessities, or maintained her, yet an action on such common law liability cannot be maintained by a superintendent of the poor. (*Goodale* agt. *Brocknor et al.*, ante, 451.)

See WILL.

Jackson agt. *Westerfield*, ante, 399.

IMPRISONED DEBTOR.

1. A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment, if it allege that he is confined in the county jail, by virtue of an execution against his person, issued in a civil action brought by a plaintiff therein named. (*Matter of Chappell*, 23 Hun, 179.)

2. Section 5 of 2 Revised Statutes, 32, relating to the discharge of

imprisoned debtors from arrest, and providing that "at the time of presenting such petition the following affidavit shall be indorsed thereon, and shall be sworn to by the applicant," does not require the affidavit to be indorsed and sworn to in the presence of the court at that time, but only that at the time of its presentation the petition shall have upon it, sworn to by the applicant, the required affidavit. (*Richmond* agt. *Praim*, 24 Hun, 578.)

3. The fact that the affidavit is annexed to, instead of being indorsed upon the petition, is immaterial. (*Id.*)

4. In an action against a sheriff for an escape, it is a defense for him if he shows that a valid order for the discharge of the debtor has been made, though it has never been formally served upon him. (*Id.*)

IMPROPER JOINDER.

1. Causes of action for the conversion and wrongful detention of personal property, and for an accounting between the parties, cannot properly be united in the same complaint. (*Thompson* agt. *St. Nicholas National Bank*, ante, 163.)

2. Where plaintiff sets up a claim against a railroad corporation for penalty incurred for excessive fare taken on one trip, and damages for personal injuries for unlawful ejection from defendant's cars on a subsequent trip, and defendant demurs to the complaint because, under section 484 of the New York Code of Civil Procedure, two causes of action have been improperly united:

Held, that, under section 488, a cause of action for penalty cannot be joined with a cause of action for personal injuries, even when

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they are claims arising out of the same transaction; and, at any rate, the claims in this action cannot be considered as arising out of the same transaction. (*Sullivan* agt. *New York, New Haven and Hartford R. R. Co.*, ante, 490.)

3. But section 484 should be construed to refer to cases of two or more good "causes of action" well pleaded, and the claim for a penalty in this case being insufficient in form and substance, the complaint contains but one cause of action, and that for personal injuries; and the demurrer should, therefore, be overruled, and the irrelevant matter in reference to the penalty should be stricken out. (*Id.*)

INFANTS.

1. In all actions except partition summons must be served upon non-resident infant defendants by publication. (*Ingersoll* agt. *Man-gam*, ante, 149.)
2. A guardian can only be regularly appointed for an infant defendant after service of the summons personally, or by the substituted mode as prescribed. (*Id.*)

INDICTMENT.

1. A husband and wife may be jointly indicted and convicted of a crime, where it appears that they were both guilty of the offense charged, and it is shown that there was no coercion, as in such case the wife acts in her own capacity, as one able to commit crime, and of her own accord and intent, the same as if she were an unmarried woman. (*Goldstein* agt. *People*, 82 N. Y., 231.)

2. By the charter of the city of Albany of 1870 (*chap. 77, Laws of 1870*), the common council were authorized to enact ordinances "to

regulate the erection, use and continuance of slaughter-houses."

Held, that the common council had power to pass an ordinance prohibiting the slaughtering of animals within certain specified portions of the city; and that under the amendment to the charter of 1871 (*title 15, sec. 1, chap. 536, Laws of 1871*), making a violation of a city ordinance a misdemeanor, an indictment lay for the violation of such an ordinance. (*Cronin* agt. *People*, 82 N. Y., 318.)

3. Also, *held*, that it was not necessary, either in the ordinance or in an indictment founded upon it, to allege the reasons for its enactment, or the exigency out of which it grew. (*Id.*)

4. When an indictment contains several counts, some good and some void for duplicity, a general verdict may be sustained upon the valid counts. (*Pontius* agt. *People*, 82 N. Y., 339.)

5. A count in an indictment for assault and battery with intent to kill, instead of alleging that the intent was "to kill," alleged that it was "to commit murder:"
Held, good. (*Id.*)

6. A count of an indictment setting forth the substance of the offense, with the circumstances necessary to render it intelligible and to inform the accused of the allegations against him, is sufficient. (*Id.*)

INJUNCTION.

See PRACTICE.

Coffin agt. *Prospect Park and Coney Island Railroad Company*, ante, 105.

1. The plaintiff's intestate, E. C., was the contractor for the building of a portion of the Utica, Ithaca and Elmira Railroad. He was paid in the bonds and stock

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of said road upon which, as collateral, he had borrowed large sums of money, and by reason of his large indebtedness an arrangement was made whereby one G., in the interests of the contractor and owners of the road, went to England and secured the sale of the bonds of the road, the proceeds being first applied to the payment of E. C.'s indebtedness secured by said bonds. Afterwards certain other payments were to be paid out of the proceeds of bonds sold, including a considerable amount to E. C. H. S. K. & Co., of London, were the bankers through whom the sales of bonds in England were made. Afterwards the interest upon these bonds not being paid, the mortgage given to secure the same was foreclosed. At the time of the sale H. S. K. & Co., or their survivor, owned or controlled, as if owner, some 946 bonds of \$1,000 each; the plaintiff owned or claimed to own some 341 bonds of \$1,000 each, and the remainder of an issue of \$1,365,000 was held and owned by various persons in small amounts. The plaintiff's title to a portion of the bonds claimed by him is contested by some of the defendants. If any of the bonds claimed by plaintiff have been sold, the plaintiff claims the proceeds. The sale of the road was made April 30, 1878, for the sum of \$50,000, and was bid in by an agent of H. S. K. & Co., the plaintiff not bidding thereon. The plaintiff alleges that prior to said sale it was agreed between K. & Co. and plaintiff that said railroad should be bid in for the joint benefit of plaintiff and K. & Co., in proportion to their respective rights as owners and holders of said bonds; that as soon as the title should be perfected a new company should be organized, which should execute a first mortgage upon said road and issue bonds of the new company, to plaintiff and K. & Co., to the same extent and amount for which they were respectively owners and

holders of bonds in the old road, and that in pursuance of such agreement the plaintiff abstained from bidding on said property, and K. & Co. bought the same. Afterwards a new company was formed by the name of the Utica, Ithaca and Elmira Railway Co., a defendant herein, and the title to the property was transferred by the purchaser to it. As the title and ownership of plaintiff to the number of shares claimed by him was controverted by some of the defendants, this action was brought in June, 1878, among other things, to have determined and adjudged the rights and interests of the several parties to this action, and to have enforced specifically by the Utica, Ithaca and Elmira Railway Co., the contract or agreement under and by virtue of which H. S. K. & Co., became the real purchasers of said railroad property upon the foreclosure sale. In November, 1880, an injunction was issued forbidding the Utica, Ithaca and Elmira Railway Co., from issuing bonds and securing their payment by a first mortgage upon its property in violation of plaintiff's equitable rights, it being alleged that such intention existed. In December, 1880, upon allegation of information that a mortgage for \$600,000 had been put upon said property by the railway company, and that the bonds were ready to issue or had been taken by H. S. K. to England to be issued, a further injunction was issued restraining the defendants from paying any part of the principal or interest of such bonds until the further order of this court. In February, 1881, upon allegation that George Rice, the president of said railway company, was about to issue to K. & Co., stock certificates to a large amount in said railway company, a third injunction was issued enjoining such issue of stock by the company to K. & Co. Upon application to continue these injunctions pending the litigation:

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Held, first, that as the only issue of fact of importance in the case relates to the alleged contract under which the defendant bid in the railroad upon the foreclosure, and that fact remains in doubt, this court ought not, if it can fairly be avoided, to pass upon the merits in such a way as will in effect, destroy the plaintiff's cause of action and strip him of relief to which a trial upon the merits might show him entitled. The plaintiff might be remediless without the aid of injunctions. The defendants are protected by adequate security for any loss they may sustain. Reference should be had to the nature and extent of the injury—to the consequences which may follow the granting or withholding the injunction. It is usually sufficient to establish a *prima facie* case entitling plaintiff to a specific performance of a contract. The result of the final hearing need not be shown to be necessarily in his favor.

Second. The statute of frauds does not apply to such a contract as is alleged in this case. Plaintiff and K. had a joint interest and *quasi* ownership of the railroad company. Their contracts for the disposition of their property carried into effect by virtue thereof are valid and effectual. The plaintiff has parted with his interest in and claim upon the promise of K. to repay him out of the proceeds of property that went into K.'s hands by virtue of the contract. It was a permission and agreement by plaintiff that the defendant K. might take possession and title to the property discharged from plaintiff's lien, provided and upon the condition that defendant should restore the lien to plaintiff after his purchase. Such a transaction is not within the statute of frauds.

Third. There is nothing in the transaction that should render it void out of consideration for public policy. It was no combina-

tion to suppress bidding at a judicial sale. The agreement by one that he will buy for the benefit of both and the absence from bidding of the other by reason thereof would not present a question of public policy.

Fourth. If the property in K.'s hands was charged with an equitable lien in favor of plaintiff, it is equally so in the hands of the railway company. To all intents the two, K. and the railway company, are one and the same, except, perhaps, to the extent that the purchasers in good faith of the bonds and stock of the railway company may have acquired rights prior to but in fraud of plaintiff's lien.

Fifth. A *lis pendens* is not a full and complete protection to the rights of the plaintiff. The *lis pendens* would not protect plaintiff's rights in or to the personal property which, by the \$600,000 mortgage, has been included as a part of the mortgaged property.

Sixth. Where the real estate and road-bed extend through several counties, and there is no proof that the complaint in the action was filed in any one of said counties, a notice of *lis pendens*, if filed, would be inoperative. (*Cornell agt. Utica, Ithaca and Elmira Railroad Company, ante, 184.*)

See REFERENCE.

Neugent agt. Swan et al., ante, 40.

2. A complaint alleged that in pursuance of a conspiracy between the defendants, two of them had, by fraudulent representations, procured from the plaintiff, in Belgium, \$17,000, and transmitted the same by the mail in registered letters, addressed to the other defendants in Brooklyn and New York; that these letters, with their contents, were at the post-office in Brooklyn and New York, and that the defendants, who were irresponsible, had made demands upon the post-masters therefor:

Held, that an injunction, restrain-

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ing the defendants from demanding or receiving any of the said registered letters, was properly granted. (*Zellenkoff* agt. *Collins*, 23 *Hun*, 156.)

3. The complaint and the affidavit upon which the order was made were verified by the Belgian consul in New York, and all of the allegations thereof were upon information and belief. Upon the hearing of a motion to vacate the injunction, which was made upon the original papers only, the plaintiff was allowed to read depositions taken in Belgium, they being the sources from which the consul had derived his information and formed his belief as to the facts set forth in the complaint and affidavit:

Held, no error. (*Id.*)

4. In proceedings to punish a defendant for contempt, for violating an injunction restraining him from collecting the rents of certain premises during the pendency of an action, brought to foreclose a mortgage thereon, the court can impose only such a fine as shall be sufficient to indemnify the party aggrieved for his actual loss and injury, and to satisfy his costs and expenses in the proceedings. (*Dejonge* agt. *Brenneman*, 23 *Hun*, 332.)

5. The amount of the loss and injury must be established by the same proof as would be required in an action at law, to recover the damages sustained. (*Id.*)

6. In this action, brought to restrain the defendant from interfering with a boom across a certain river, the plaintiffs procured an order temporarily restraining him from so doing, and requiring him to show cause why the injunction should not be continued until the entry of final judgment in the action. Upon the return day an order was made, after a partial hearing upon the merits, pro-

viding that if the plaintiffs should, if required by the defendant, give an undertaking for a larger sum, the injunction should be continued until the final determination of the action. The order also authorized the defendant to give notice of a further hearing upon the order to show cause before another judge. Increased security was given, but no further hearing was had, and upon the trial a judgment was rendered in favor of the defendant:

Held, that the trial was necessary to enable the defendant to get rid of the injunction, and that he was entitled to recover the fees of his counsel thereon as a part of the damages secured by the undertaking. (*Newton* agt. *Russell*, 24 *Hun*, 40.)

7. The entry of a final judgment in an action does not, unless it be so expressly declared therein, dissolve a temporary injunction theretofore granted in the action, where the defendant has appealed from the judgment and given an undertaking to stay all proceedings during the pendency of such appeal. (*Gardner* agt. *Gardner*, 24 *Hun*, 627.)

INSURANCE COMPANIES.

See TAXATION.

The People agt. *National Fire Insurance Company*, ante, 334.

The People agt. *National Fire Insurance Company*, ante, 342.

INSURANCE (FIRE).

1. Where the policy of fire insurance contained the following clause: "No suit or action of any kind against this company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next

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after the loss or damage shall occur." By the terms of the policy, proofs of loss were to be furnished in sixty days from the happening thereof. The fire occurred January 11, 1876, and the suit was not commenced till March 3, 1877:

Held, that a recovery is not barred by the clause in the policy. The words "after the loss shall occur," refer to the time when the loss shall become a fixed demand, and not to the time of the actual destruction. Limitations of action never commence until the cause of action accrues. (*Steen agt. Niagara Fire Insurance Company, ante*, 144.)

2. The policy contains a clause which declares, after the enumeration of several other matters: "or if the premises, at the time of insuring, or during the life of this policy, vacant, unoccupied, or not in use, whether by the removal of the owner or occupant, or for any cause, without this company's consent is indorsed hereon, this insurance shall be void, and of no effect." On the application of the insured, the general agents of the defendant wrote in the body of the policy, so as to make a part and portion of the contract, this clause: "The dwelling being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to this policy:

Held, that the clear effect of the insertion of such a clause in the body of the policy was to modify the contract as originally made; and the one making it void for non-occupancy must be read in connection with the amendment, and so reading it the policy is not vitiated; for the premises were only temporarily vacant at the time of the fire, and were then "in charge of a trusty person living near by."

Held, further, that a declaration of the defendant, by its general agents, when informed of the last vacation of the premises, that the

contingency was provided for, would waive the forfeiture, if any existed. (*Id.*)

3. Where the policy contained a clause as to liens, as follows: "In case of assignment, before or after loss, whether of the whole policy or of any interest in it, or of any sale, transfer or change of title in the property insured by this company, or of any undivided interest therein, or the entry of a foreclosure of a mortgage, or the creation of any lien, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease." Various judgments were recovered against A., to whom the policy was issued, and under one the premises on which the insured dwelling was located was sold by the sheriff to S., the plaintiff. Four days after such purchase the defendant, by its general agent, and by an indorsement made upon the policy, consented to the assignment thereof by A. to S.:

Held, that the consent to a transfer was a renewal of the policy, if it had become void by the sale or recovery of the judgments.

Held, further, that the recovery of the judgments against A. did not vitiate the policy. He did not, by his own voluntary act, encumber the property, and he must have created the liens to make the policy void. (*Id.*)

INSURANCE (LIFE).

1. Where plaintiffs, suing as policyholders of the defendant corporation, seek to call the directors of the company to account for various alleged breaches of trust, whereby the company's assets are claimed to be wasted and wrongfully misappropriated, and asks for a receiver and an accounting:

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Held (sustaining demurrer to complaint), 1. That no trust was created or now exists between the plaintiffs and the defendant corporation and its directors. 2. The plaintiffs' alleged claim being thus reduced to mere creditors of the defendant corporation, which is solvent and able to meet all its obligations, they can only obtain relief as judgment creditors. (*Bewley* agt. *Equitable Life Assurance Society*, ante, 344.)

INTERPLEADER.

1. This action was brought by an insurance company to compel persons who had recovered a judgment against it, to interplead with others who claimed to be assignees of or to have acquired liens upon the said judgment. The plaintiff, the judgment creditors and all of the defendants except two, were residents of this state:

Held, that the action could not, upon the petition of one of the non-resident defendants, be removed to the United States district court under the act of congress passed in 1875 (*sec. 2 of chap. 139*). (*Republic Fire Ins. Co.* agt. *Keogh*, 23 *Hun*, 644.)

2. This action was brought by the plaintiff, as the assignee of one Comerford, to recover certain money collected for the assignor from persons indebted to him and still held by the defendant for the assignor. The defendant, who had notice of the assignment, moved upon an affidavit stating that certain persons claim this money under judgments obtained against the assignor, to have them substituted as defendants in his place:

Held, that an order of interpleader should not have been granted. (*Delancy* agt. *Murphy*, 24 *Hun*, 503.)

JUDGMENT.

1. Where a case presents a question of law solely upon uncontro-

verted facts and a verdict merely formal is directed for plaintiff, it is not error for the trial court, in setting aside the verdict on motion to direct final judgment for the defendant, at least where no objection to this course is made at the time. (*Hall* agt. *Hall*, 81 *N. Y.*, 131.)

2. A judgment by default in ejectment is not conclusive against persons claiming under the defendant, unless it has been for three years docketed in the office of the clerk of the court in which it was rendered (2 *R. S.*, 309, *sec. 38*). (*Sheridan* agt. *Linden*, 81 *N. Y.*, 182.)

3. The "judgment book" required to be kept by every clerk of a court of record (*Code of Procedure*, *sec. 279*; *Code of Civil Procedure*, *sec. 1236*) is a separate and distinct book from the "docket book," also required to be kept (2 *R. S.*, 360, *sec. 13*; *Code of Procedure*, *sec. 282*; *Code of Civil Procedure*, *sec. 1245*); and an entry of such a judgment in the "judgment book" is not sufficient; unless entered in the "docket book" it is not docketed within the meaning of the statute. (*Id.*)

4. The supreme court has power to open defaults and to vacate judgments, and a judgment entered upon demurrer may be relieved against as well as any other. (*Vanderbilt* agt. *Schreyer*, 81 *N. Y.*, 646.)

5. Where trustee refuses obedience to judgment requiring him to make payment out of funds in his hands, an order directing execution against him personally is proper. (*See Williams* agt. *Thorn*, 81 *N. Y.*, 381.)

6. Upon appeal from judgment in this action the general term affirmed it, provided plaintiff would stipulate to deduct therefrom a specified sum; plaintiff filed the

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required stipulation, also the decision of the general term, signed by one of the judges:

Held, that this was not an entry of judgment within the meaning of the provisions of the Code of Civil Procedure in reference thereto (*secs. 1236, 1354*). (*Knapp* agt. *Roche*, 82 N. Y., 366.)

7. The memorandum handed down by a general term of its decision of an appeal is not a judgment, but simply an authority to enter one. (*Id.*)

8. Upon the filing of such decision a formal judgment should be prepared and entered in the judgment book, attested by the signature of the clerk; and to constitute a judgment-roll, a copy thereof should be annexed to the papers upon which the appeal was heard. (*Id.*)

9. Accordingly *held*, that as the duty of preparing such judgment-roll is imposed upon the "attorney for the party at whose instance the final judgment is entered" (*Code, sec. 1238*), an order was properly granted directing the plaintiff to enter judgment and file a judgment-roll, and for that purpose authorizing him to file a printed copy of the case on appeal. (*Id.*)

JUDICIAL SALES.

1. Statutory proceedings to divest title to real estate must be strictly pursued; and a substantial departure from the requirements of the statute renders the proceedings void. (*Stilwell* agt. *Swarthout*, 81 N. Y., 109.)

2. Where in proceedings by administrators for the sale of real estate to pay debts, the order of the surrogate directing persons interested in the estate to show cause, &c., is made returnable in less time than that required by statute (2 R. S., 101, *sec. 5*), *i. e.*, six weeks from the time of making the order, it

shows a want of jurisdiction fatal to its validity, and all proceedings founded thereon are void. (*Id.*)

3. The rights of infant defendants in such proceedings cannot be waived by failure to make the objection. (*Id.*)

4. Where in such proceedings an order was made appointing a guardian for infants, but it did not appear that he consented to or did act, or that he had notice of his appointment; but on the contrary it appeared that he acted as counsel for the claimant in the proceedings, *held*, that even if his appearance for the infants would have constituted a waiver, his consent at least was essential. (*Id.*)

5. An omission on the part of the administrators to make a report of sale to the surrogate, and to obtain an order confirming the report prior to a conveyance to the purchaser at the sale, is also a fatal defect. (*Id.*)

6. These defects are not cured by the provisions of the act "for the protection of purchasers of real estate upon sales made by order of surrogate" (*Sec. 3, chap. 82, Laws of 1857, as amended by chap. 260, Laws of 1869*). (*Id.*)

7. Where such proceedings are legal and the sale under them valid, the fund realized is under the control and within the exclusive jurisdiction of the surrogate; to reach it, proceedings may be instituted before that officer to compel a report of the administrators, the distribution of the fund and the payment of any lawful demand. (*Id.*)

8. A purchaser of lands at a sheriff's sale, under execution, whether he be the judgment creditor or a stranger, is legally entitled to his deed at the end of the fifteen months, unless a valid redemption has been made; he cannot be de-

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prived of the benefit of his purchase, against his will, by the mere deposit with the sheriff of the amount of his bid, by a person not entitled to redeem. (*In re Eleventh Ave.*, 81 N. Y., 436.)

9. The purchaser, however, may assign his right; he may also waive any defect in an attempted redemption; and an acceptance of the money tendered for that purpose is such waiver, and a subrogation of the person paying it to his right to a deed. (*Id.*)

JURISDICTION.

See SURROGATE.

The People ex rel. Adams agt. Westbrook, ante, 138.

See COUNTY COURTS.

Sweet agt. Flannagan, ante, 327.

1. Statutory proceedings to divest title to real estate must be strictly pursued; and a substantial departure from the requirements of the statute renders the proceedings void. (*Stillwell agt. Swarthout*, 81 N. Y., 109.)
2. Where in proceedings by administrators for the sale of real estate to pay debts, the order of the surrogate directing persons interested in the estate to show cause, &c., is made returnable in less time than that required by statute (2 R. S., 101, sec. 5), *i. e.*, six weeks from the time of making the order, it shows a want of jurisdiction fatal to its validity, and all proceedings founded thereon are void. (*Id.*)
3. An omission on the part of the administrators to make a report of sale to the surrogate, and to obtain an order confirming the report prior to a conveyance to the purchaser at the sale, is also a fatal defect. (*Id.*)
4. These defects are not cured by the provisions of the act "for the protection of purchasers of real

estate upon sales made by order of surrogate" (*Sec. 3, chap. 82, Laws of 1857, as amended by chap. 260, Laws of 1869*). (*Id.*)

5. Where such proceedings are legal and the sale under them valid, the fund realized is under the control and within the exclusive jurisdiction of the surrogate; to reach it, proceedings may be instituted before that officer to compel a report on the administrators, the distribution of the fund and the payment of any lawful demand. (*Id.*)
6. The supreme court of this state has jurisdiction over an action *ex contractu* brought by a citizen of the state against a national bank located in another state. (*Robinson agt. Nat. Bk. of Newberne*, 81 N. Y., 385.)
7. The provision of the national banking act (*U. S. R. S.*, sec. 5798) authorizing suits against the banking associations organized under it, to be brought in the court of the county or city of the state in which the association is located, does not have the effect to deprive other courts of jurisdiction, it is permissive, not mandatory, and therefore does not limit the general rule permitting civil cases arising under the laws of the United States to be prosecuted and determined in the state courts, where no exclusive jurisdiction has been vested in the federal courts, or the state courts have not been prohibited from entertaining jurisdiction. (*Id.*)
8. The supreme court has power to open defaults and to vacate judgments, and a judgment entered upon demurrer may be relieved against as well as any other. (*Vanderbilt agt. Schreyer*, 81 N. Y., 646.)

JURY.

1. The plaintiff, one of the defendant's employees, brought this ac-

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tion to recover damages for injuries occasioned by a collision between the car in which he was riding and one in another train. The defendant claimed, and the plaintiff denied, that at the time of the accident the plaintiff's arm was outside of the window, by which he was seated. The judge submitted to the jury four questions, which they were directed to pass upon in addition to their general verdict; the first involving the question of the plaintiff's contributory negligence, and the other three, the negligence of the defendant in employing certain persons named, and the negligence of one of such employees. After retiring, the jury asked whether they were at liberty to find a general verdict, without passing on the special questions submitted to them, and were informed that if they could agree on a general verdict, and could not agree on the special findings, they might find such a verdict and come into court and report, and the court would do what it thought proper. Thereafter, the jury found a general verdict for the plaintiff for \$6,000, and stated that they could not agree as to the special findings. The defendant's counsel excepted to the verdict as irregular, and moved to set it aside:

Held, that the reply of the court to the question of the jury was not equivalent to a withdrawal of the special questions submitted to them, nor was the failure of the counsel for the defendant to except to what the court then said a waiver of his right to object to the rendering of a general verdict alone. (*Ebersole* agt. *Northern Central R. R. Co.*, 23 *Hun*, 114.)

2. That as there was nothing to show that the jury had agreed in deciding the first of the questions submitted to them (that relating to the plaintiff's contributory negligence) in favor of the plaintiff, a general verdict in his favor could not be sustained.

Quere, as to whether, after special questions have been submitted to a jury, they can be withdrawn without the consent of the parties, when the jury intimate that they cannot come to an agreement thereupon; and as to whether, in any case, a general verdict and a report that they cannot agree on the special findings can be allowed to stand. (*Id.*)

3. Chapter 78 of 1834, providing that one arrested for disturbing a religious meeting may demand to be tried by a jury to consist of the same number of jurors, to be summoned in the same manner as is provided for the summoning of jurors before courts of special sessions, is valid; and the fact that the jury before which the trial is to be had is to consist of six instead of twelve jurors, does not render the act unconstitutional, as in violation of section 2 of article 1 of the constitution, providing that "the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever." (*People ex rel. Eckler* agt. *Clark*, 23 *Hun*, 374.)
4. In an action, brought by the administrator of a deceased person to recover articles of personal property alleged to form part of his estate, where equitable relief by way of an injunction and the appointment of a receiver is demanded, the plaintiff has no right to a trial by jury, unless the defendant consent thereto, unless issue be framed and settled in accordance with the usual practice in equity cases. (*Ward* agt. *Plato*, 23 *Hun*, 402.)
5. After a trial had been commenced before a jury and the plaintiff had rested his case, the questions of law were, at the suggestion of the court, submitted to it for decision, and the jury was thereupon discharged without objection. The court subsequently made and filed findings of fact

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and of law, and decided the case in favor of the plaintiff:

Held, that the defendant could not complain on appeal that he had been deprived of his right to a trial by jury. (*Graham* agt. *O'Hern*, 24 *Hun*, 221.)

6. Upon the polling of a jury one of them stated that he was not satisfied with the verdict. Having stated, in answer to a question put by the court, that he had agreed to the verdict, the court, against the objection of the defendant's counsel, directed the verdict to be entered:

Held, that this was error, that the right of a juror to dissent from a verdict to which he has before agreed, is not lost until the verdict has been recorded. (*Weeks* agt. *Hart*, 24 *Hun*, 181.)

JUSTICES' COURT.

1. When, upon an application for an adjournment in a justice's court, the good faith of the applicant is involved, the granting or refusing of the adjournment rests in the sound discretion of the justice, and an appellate court will not interfere with the decision of the justice, unless an abuse of discretion be clearly shown. (*Bush* agt. *Weeks*, 24 *Hun*, 545.)
2. Although it is not usual to require a party to state what he expects to prove by an absent witness on the first application for an adjournment, yet, when his conduct in applying for a second adjournment is such as to cast suspicion upon his good faith, and he refuses to state, either upon oath or otherwise, what he expects to prove by his absent witness, the justice may refuse to grant the adjournment. (*Id.*)

LANDLORD AND TENANT.

1. Where, in dispossession proceedings, the tenant admitted that he

was the tenant in possession of the premises in question, but denied that any attornment had taken place between him and the relator, it appeared that the relator's claim to the possession of the premises rested upon a lease which was assigned by *mesne* conveyance to him, and that the tenant held possession under one of the assignors; but the lease referred to in the assignments was not produced, and the proceedings were dismissed upon the ground that the relation of landlord and tenant did not exist:

Held, that this was error, because the tenant, having hired from one of the assignors of the lease, was precluded from controverting his landlord's title, and the relator, as assignee, succeeded to the rights of the latter. (*The People* *ex rel. Barnes* agt. *Angel*, *ante*, 157.)

LATENT AMBIGUITY.

See WILL.

Gallup agt. *Wright*, *ante*, 286.

Sutherland agt. *Clark*, *ante*, 310.

LIS PENDENS.

See INJUNCTION.

Cornell agt. *Utica, Ithaca and Elmira Railroad Company*, *ante*, 184.

MALICIOUS PROSECUTION.

1. T. and Y., in a suit against N. and M., held them to bail on a provisional order of arrest, but after judgment, without taking the debtors in satisfaction, caused their arrest under a Stilwell warrant. After the latter proceedings had been dismissed — because plaintiffs having elected to proceed under the provisions of the Code, could not take proceedings under the Stilwell act, and the decision had been affirmed by the

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general term, and while a further appeal was pending—N. brought this action against T. and Y. for false imprisonment and malicious prosecution:

Held (reversing judgment for plaintiff): 1. That the two causes of action being inconsistent, and could not, therefore, be joined in one action, plaintiff should have been required to elect under which count he should proceed.

2. It being incumbent on plaintiff, in order to make out a cause of action for malicious prosecution, to show that there was a want of probable cause for the warrant, and as the plaintiff had given no evidence on his part to establish any such cause of action and had objected to any evidence of the existence of probable cause, the complaint as to this cause of action was properly dismissed.

3. The complaint for a malicious prosecution should have been dismissed also, because no such action is maintainable unless plaintiff avers and proves that the suit or prosecution was determined in his favor, while, when this action was brought, the proceedings under which the arrest had been ordered were not terminated, as an appeal was then pending.

4. As to the remaining count, for false imprisonment, the complaint should have been dismissed, the process under which the plaintiff had been arrested being regular, and the arrest under it lawful; and the discharging of the warrant because the plaintiff should not be allowed to resort to two remedies, did not render the warrant and the proceedings under it void. (*Nebenzahl* agt. *Townsend*, ante, 353.)

2. In an action for malicious prosecution it is for the plaintiff to establish affirmatively the want of a reasonable and probable cause for the prosecution, and that it was instituted for malice. (*Thaule* agt. *Krekeler*, 81 N. Y., 428.)

3. Upon the trial of such an action it is for the court to determine, as a matter of law, assuming plaintiff's evidence to be true, whether plaintiff has established these propositions. (*Id.*)

MANUFACTURING CORPORATIONS.

1. In this action the plaintiff sought to charge the defendant, as one of the trustees of a manufacturing corporation, with the amount of a certain debt of the corporation, under the provisions of section 15 of the general manufacturing act, on the ground that certain reports made by the corporation were false in material representations contained therein, and that the defendant, who had signed the same, knew such reports to be false. It appeared, among other things, on the trial that the whole capital stock (\$300,000) was issued in payment for the mine, manufactory and other property of the corporation. The case was tried and submitted to the jury on the theory that if the property had been purchased by the corporation for a price in excess of its value, and if the defendant knew at the time when he signed such reports that such was the fact, then the plaintiff was entitled to the debt sued for:

Held, on the question of the good faith of the trustees in their estimate of the value of the property for which the capital stock was issued, and on the question of their notice of its actual value, that it was competent to show the representations made to them by experts and others competent to judge of the actual value of the property. But that it was for the jury to determine whether they, in good faith, acted and relied on the opinions which they so received and believed the value of the property to be as represented.

Held, further, that it is not necessary that each trustee should

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have actual personal knowledge of the property and of its value. That in many cases they must depend upon the representations of experts and others presumed to have a practical knowledge of the property and its value. (*Brockway agt. Ireland, ante, 372.*)

MARINE COURT.

1. While, under the Code of Procedure (*secs. 46, 47, 58, of Code of 1848; secs. 53, 54, 65, of Code of 1848*), an action could not be brought in the marine court of the city of New York against an executor or administrator as such, yet, where after the court had acquired jurisdiction of an action the defendant died, the action did not abate, but could be continued against his personal representatives. (*People ex rel. Egan, agt. Justices Marine Court, 81 N. Y., 500.*)
2. This rule is not changed by the Code of Civil Procedure, as, while a similar prohibition is contained therein (*sec. 316, sub. 3*), the provisions for continuing actions (*secs. 755, 756, 757*) are made applicable to the marine court (*sec. 5, chap. 449, Laws of 1876, as amended by sec. 5, chap. 318, Laws of 1877*), and the law stands as it did under the former Code. (*Id.*)
3. After judgment had been rendered against defendant in an action in the marine court, and after an appeal from the judgment had been argued at the general term, but before decision, the defendant died; on motion of plaintiff the marine court granted an order continuing the action against the executor of the will of the deceased defendant, to whom letters testamentary had been issued. The general term, in the meantime, reversed the judgment and granted a new trial. On application of the executor the supreme court granted a writ of prohibition, restraining the marine

court from entertaining further jurisdiction of the action:

Held, error; also, that the order affected and deprived plaintiff of a substantial legal right, and in effect determined the action, and so was reviewable here. (*Id.*)

4. Also, *held*, that even if the decision of the general term of the marine court was void under the Code of Civil Procedure (*sec. 763*), because rendered after the death of the defendant, the point was not available on appeal to this court, from the order granting said writ. (*Id.*)

MARRIED WOMAN.

See TRUSTS.

Thebaud agt. Schermerhorn, ante, 200.

MECHANICS' LIEN.

1. Where moneys are deposited with the county clerk to remove mechanics' lien upon certain lands, it does not confer an absolute right in the lienor to receive the money without first establishing his lien. (*The People ex rel. Flynn agt. Butler, ante, 274.*)
2. The plaintiffs having furnished materials to one Sliker, who had contracted to erect a building upon land in the city of Buffalo belonging to the defendant, filed a notice of lien against the premises under section 1 of chapter 305 of 1844, as amended by chapter 872 of 1871. The notice served by him, as required by section 6 of the act of 1844, in instituting proceedings to foreclose the lien, did not allege that there was anything due, or to become due, to Sliker on his contract with the defendant, or that the defendant was in any way indebted, or was to become indebted, to him thereon:

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Held, that the notice required by the act took the place of a complaint, and was subject to the rules governing pleadings in other actions.

That as it did not show that defendant was or would become indebted to Sliker, under the contract, it did not state facts sufficient to constitute a cause of action, and should have been dismissed. (*Dart* agt. *Fitch*, 23 *Hun*, 361.)

3. The notice was filed in the clerk's office on October 25, 1877. On October 21, 1878, the report of the referee in favor of the plaintiffs was filed, and on October twenty-fifth judgment in their favor was entered therein. On November twenty-third an order was made setting aside the judgment as prematurely entered, and directing that a judgment be entered *nunc pro tunc* as of October 26, 1878:

Held, that under section 6 of chapter 872 of 1871, the lien expired, unless judgment was entered within one year from the time of the filing of the notice. (*Id.*)

4. That though the court had power to order its judgments to be entered *nunc pro tunc*, it could not thereby extend the time limited by the statute within which the lien must be prosecuted to judgment. (*Id.*)
5. The defendants leased certain lands and quarries to a cement company for the term of seven years, with privileges of renewal, the company agreeing to erect certain improvements thereon, which were to become the property of the lessors upon the termination of the lease. The plaintiff, in pursuance of a contract made with the company, erected the improvements upon the lands, the defendants assisting in locating the same and directing him as to the foundations

thereof. The cement company having failed, the plaintiff filed a notice of lien under chapter 489 of 1873:

Held, that he thereby acquired a valid lien upon the land as against the defendants, the owners thereof. (*Otis* agt. *Dodd*, 24 *Hun*, 538.)

MERGER.

See MORTGAGE FORECLOSURE.

Franklin agt. *Hayward* et al., ante, 43.

MISJOINDER.

See MALICIOUS PROSECUTION.

Nebenzahl agt. *Townsend*, ante, 353.)

See FRAUDULENT CONVEYANCE.

Royer Wheel Company agt. *Fielding* et al., ante, 437.

MISTAKE.

See BILLS, NOTES AND CHECKS.

Southwick agt. *First National Bank*, ante, 164.

MORTGAGE FORECLOSURE.

1. Where A., who purchased certain mortgaged premises at a foreclosure sale, afterwards executed a mortgage upon said property, which mortgage was subsequently assigned to B.; and then it being first learned that at the time of the foreclosure C. had a junior mortgage on the premises, and that he, through mistake, had not been made a party to the action. A. took an assignment of the foreclosed bond and mortgage, and joined with B. in this action for a second foreclosure of the mortgage, C. being made defendant:

Held, upon demurrer by C., that such second foreclosure action

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can be maintained, and thereby C.'s mortgage be shut off from being a first lien, the mortgage lien anterior to C.'s not being thereby increased. (*Franklin* agt. *Hayward et al.*, ante, 43.)

2. B. is a proper party to the suit. (*Id.*)
3. With respect to merger no inflexible rule can be formulated. The question depends in each case upon the interests and intent of the parties, and the demands of justice and equity. (*Id.*)
4. The word "must," in section 1678 of the Code of Civil Procedure, is directory merely, and a foreclosure sale of two buildings is not invalidated because they have been sold together. (*Wallace et al.* agt. *Feely et al.*, ante, 226.)
5. The question whether a sale in one parcel is proper or not, is one that must be determined by the circumstances of each case. (*Id.*)

MOTIONS AND ORDERS.

1. Where a motion was made by A., founded upon her judgment and execution, to vacate the attachment on the ground of the insufficiency of the proofs upon which it was granted, which was denied on the ground that the judgment was irregular, and that she did not acquire a lien upon the attached property, and, therefore, could not make the motion, A. then made a new motion to vacate the same attachment, alleging that she had a deed of the attached real estate, made upon the same day her judgment was rendered, and that when she made the former motion she supposed her judgment was a lien upon the land. She had previously applied to the special term for leave to renew the former motion, for the same reason, and leave was refused:

Held, that the present motion

not being founded upon her right as lienor, to move to vacate the attachment, but upon her right as grantee under a deed, was not in the nature of an application to review the question decided on the first motion and the decision on that motion, that she was not a lienor under her judgment and execution, was in no way inconsistent with a new motion founded upon her ownership of the land attached. (*Steuben County Bank* agt. *Alberger*, ante, 227.)

2. The fact that she might, on the first motion, have proceeded on this ground also, did not preclude her from resorting to an independent motion to vacate, after the first motion was denied. (*Id.*)
3. The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision of the former motion, cannot apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion. The decision of the former motion is no bar to this motion. (*Id.*)
4. The doctrine of *res adjudicata* does not apply with the same strictness to decisions on motions as to judgments:
Held, that the order of the general and special term should be reversed, and an order entered vacating the attachment as against the land embraced in the deed (*Modifying decision in same case*, 78 *N. Y.*, 252). (*Id.*)
5. Upon appeal from a judgment of special term, dismissing plaintiff's complaint, the general term reversed the judgment, directed that an "interlocutory judgment be entered upon the facts found by the court; that a referee be appointed to take and state the accounts of the respective parties, and that

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upon the filing and confirmation of his report, a further and final judgment should be entered by the special term for the final disposition of the entire controversy between the parties." Plaintiff appealed to this court from the order, and the order of special term entered in pursuance thereof; he gave no stipulation for judgment absolute in case of affirmance:

Held, that the order of general term was not a "final judgment" within the first subdivision of section 198 of Code of Civil Procedure; nor was it an order which in effect determined the action and prevented a final judgment, or an order made upon or deciding an interlocutory application, or an order deciding a question of practice within the second subdivision of said section; that as there was no stipulation it was unnecessary to determine whether the order could be regarded as an order granting a new trial. Appeal therefore dismissed. (*Jones* agt. *Jones*, 81 N. Y., 35.)

6. Effect must be given to an order of the court according to its terms. (*Fisher* agt. *Gould*, 81 N. Y., 228.)

7. An order of general term, reversing a judgment entered upon a decision of the court, stated that the reversal was "upon the law and the facts:"

Held, that it sufficiently appeared that the reversal was "upon a question of fact," within the meaning of the provision of the Code of Civil Procedure (*sec.* 1338), authorizing a review of such a question by this court. (*Van Wyck* agt. *Watters*, 81 N. Y., 352.)

8. Where an order denying an application for an order of arrest on commitment does not show that it was not made upon the merits, it will be so presumed, and the order is not reviewable here. (*In re Townsend*, 81 N. Y., 644.)

9. The opinion below cannot be looked into, unless the language of the order is ambiguous and needs aid for an understanding of the ground on which it went. (*Id.*)

10. The holder of a junior mortgage is entitled to be subrogated to the rights of the holder of the senior mortgage upon payment of the amount thereof, and may, upon tender of the amount, compel an assignment, although he does not occupy the position of a surety. (*Twombly* agt. *Cassidy*, 82 N. Y., 155.)

11. This relief may be granted upon motion before judgment, in an action to foreclose the senior mortgage, in which the holder of the junior mortgage is a party defendant. (*Id.*)

12. Upon such motion, the plaintiff cannot object that the defendants, other than the moving party, have not had notice. (*Id.*)

13. An order made in such a case directed an assignment to the junior mortgagee, or to a person to be named by him:
Held, no error. (*Id.*)

14. The order directed the discontinuance of the action, without costs, as against plaintiff:

Held, that this was in the discretion of the court, at least that plaintiff was not in a position to raise the question. (*Id.*)

15. An order of the supreme court punishing an attorney for professional misconduct, not committed in the presence of the court, but based upon evidence, is reviewable upon the facts in this court. (*In re Eldridge*, 82 N. Y., 161.)

16. Where the defendant in an action of divorce was in contempt because of disobedience of an order of the court directing the payment of alimony, *held*, that an order directing defendant's answer be

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stricken out unless he obey the previous order within five days, also an order striking out the answer upon his failure to obey, and directing a reference to take proof of the facts stated in the complaint was proper. (*Walker agt. Walker*, 82 N. Y., 260.)

17. After the commencement of this action, plaintiff assigned to R. and A. the claim upon which it was brought; thereafter plaintiff was adjudged a bankrupt and an assignee of his property appointed; judgment was subsequently recovered, and after it was perfected, plaintiff died intestate, leaving no property, real or personal. No administrator of his estate has been appointed. Upon notice to defendants' attorneys and to the widow and next of kin of the decedent, a motion was made on behalf of R. and A. that they be substituted as plaintiffs which was granted; defendants appealed. On argument at general term the respondent produced and filed a stipulation of the assignee in bankruptcy waiving notice of motion, and all objection to the order:

Held, that the order was properly affirmed; that the court had a right to proceed without the appointment of an administrator of the original plaintiff; also, that the stipulation was properly received and considered by the general term. (*Schell agt. Devlin*, 82 N. Y., 333.)

18. An appeal lies to the general term from an order of the special term, directing judgment for plaintiff on account of the frivolousness of defendant's answer, before the entry of judgment in pursuance thereof. (*Elwood agt. Roof*, 82 N. Y., 428.)

19. But an order of general term reversing the special term order is not appealable to this court; it is in the discretion of the court below whether to pass upon the sufficiency of the answer, on mo-

tion, or to put the plaintiff to a regular demurrer. (*Id.*)

20. An order of general term reversing an order of special term, vacating an assessment, without ordering a rehearing, is a final order appealable to this court. (*In re N. Y. P. E. Pub. School*, 82 N. Y., 606.)
21. When order properly granted requiring attorney for party "at whose instance the final judgment is entered" to enter judgment and file judgment-roll. (*See Knapp agt. Roche*, 82 N. Y., 366.)
22. When no sufficient decision in writing is filed as required by section 1010 of the Code, the remedy of the party is by motion for new trial as prescribed by said section, not by motion to set aside judgment. (*See Eaton agt. Wells*, 82 N. Y., 576.)

MUNICIPAL CORPORATIONS.

1. Public powers or trusts devolved by law upon the governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. (*Edwards agt. City of Watertown*, ante, 463.)
2. But there is a distinction between acts *quasi* judicial or involving discretion, and those which are merely ministerial. (*Id.*)
3. Where in an action brought to recover for work and labor performed, materials furnished and money paid out for the defendant, a municipal corporation, in fitting up certain rooms leased by the defendant, and furnishing them with fixtures and furniture for the use of the defendant's officers, it was found by the referee that, at a regular meeting of the common council, it was resolved to take a lease of the rooms in question

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for five years, with a privilege of ten years if desired at a rent of \$400 per year; and at the same meeting the mayor of the city, as the presiding officer of the common council, appointed a committee consisting of three members of the common council and the recorder of the city to arrange the rooms and procure the necessary furniture, the action of the mayor being approved by the common council. That said committee, after their appointment, met informally and requested the plaintiff to do the work and furnish the materials for which the action is brought. The plaintiff was the agent of the owners of the rooms, and as such had negotiated with the defendant's officer for the lease of the rooms. The committee promised the plaintiff that he should be paid for such services and material aside from the \$400 a year which his principals were to receive for the rent of the rooms. The plaintiff thereupon caused the work to be done and the materials to be furnished, and the city officer took possession of the rooms so furnished in the latter part of November, 1874. On the 9th of December, 1874, the common council held a meeting in said rooms and by resolution accepted them as fitted up by the plaintiff, and authorized a lease to be taken in accordance with the terms of the previous resolutions, and such lease was afterwards executed on the part of the owners and lessors by the plaintiff as their agent. That the fact that the committee had promised the plaintiff compensation, aside from the contemplated rent of \$400 a year, was not made known to the common council until after the execution of the lease:

Held, that the common council could delegate to a committee power to procure the necessary furniture for the rooms. That the principle that public powers or trusts devolved by law upon the

governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others, does not apply to this case. The distinction is between acts *quasi* judicial, or involving discretion, and those which are merely ministerial.

Held, also, that the acceptance of the furnished rooms by the common council was a ratification of the action of the committee. (*Id.*)

4. The position that the common council had no authority to appoint upon the committee a person not a member of their body is untenable:

Held, further, that the plaintiff is not estopped from recovering, by his action respecting the lease. The defendant's committee well knew that the furniture was provided by the plaintiff, and not by his principal, and that it was to be paid for, aside from the rent of the rooms, and their knowledge on the subject is to be treated as the knowledge of their principal. (*Id.*)

NEW TRIAL.

1. Section 999 of the Code does not authorize the trial judge to entertain a motion for a new trial on the minutes, in the case of the dismissal of the complaint on the plaintiff's own showing; the plaintiff's remedy being either by appeal or a motion for a new trial at special term on a case to be made and settled. (*Dusenbury* agt. *Dusenbury*, ante, 432.)

See EJECTMENT.

Reed agt. *Loucks*, ante, 434.

2. Where, in an action brought to foreclose a mortgage, issues of fact are framed and, in pursuance of an order to that effect, tried by a jury, a motion for a new trial on a case and exceptions, founded upon irregularities committed on

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the trial by the jury, must be made before the entry of judgment in the action, otherwise the findings of the jury will be deemed to have been acquiesced in, and questions of fact involved therein cannot be reviewed on an appeal from the judgment. (*Chapin* agt. *Thompson*, 23 *Hun*, 12.)

3. The reversal of a judgment entered upon the report of a referee and the granting of a new trial does not vacate the order of reference; and the new trial must be had before the same referee, unless otherwise specially provided. (*Catlin* agt. *Adirondack Co.*, 81 *N. Y.*, 379.)

NEW YORK (CITY OF).

1. An appeal to the court of appeals does not lie from an order of the supreme court confirming the report of commissioners of estimate and assessment in proceedings to open streets in the city of New York. (*Matter of One Hundred and Thirty-eighth and other streets*, ante, 284.)
2. The report of the commissioners is final and conclusive as to the amount of awards for land taken and the assessments for benefit, but not as to the regularity or validity of the proceedings. (*Id.*)
3. Where the proceeding is wholly unauthorized by law, a motion may be made to vacate and set it aside. (*Id.*)
4. The commissioner of public works run an underground drain through lots of the petitioners, which had already been thoroughly drained by means of ordinary sewers, for which an assessment had been duly paid:
Held, that an assessment for such underground drain was properly vacated, the appropriation of petitioner's lots for such drains

without compensation being illegal.

Held, also, that the claim that the lots were drained for their own benefit and because it was essential to the public health and welfare, is not sustained by the proof.

Held, further, that such assessment could not be laid because the assessed valuation of the lots prior thereto being "nothing," it was impossible to comply with the law prohibiting an assessment exceeding one-half the value of the property assessed. (*Matter of Rector, &c., of the Church of the Holy Sepulchre*, ante, 315.)

5. Where the valuation in an assessment roll is put merely in figures under the heading of "value of real estate," without anything to indicate whether they represented dollars or cents:

Held, that there is no valuation shown by such assessment roll. (*Id.*)

NEW YORK STOCK EXCHANGE.

1. The plaintiff having been expelled from membership of the New York Stock Exchange upon an accusation of "obvious fraud," and the court having held such expulsion to be illegal. In the meantime, the defendant, treating the plaintiff as effectually expelled, sold his seat and appropriated the proceeds to the payment of his creditors in the exchange:
Held, that the exchange, sued in the name of its president, is liable to plaintiff for the amount of the proceeds realized for such seat. (*Swewell* agt. *Ives*, ante, 54.)
2. The New York Stock Exchange being composed of more than seven persons, owning and having an interest in property in common, and who would be liable to an action on account of such own-

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ership and interest, this action being brought by the plaintiff, a member, in relation to his interest in that property, is properly brought against the defendant as president. (*Id.*)

3. The property wrongfully taken or appropriated by the defendant in satisfaction of a demand against the plaintiff, as owner, cannot be set up in bar or in mitigation of damages suffered by him. (*Id.*)
4. The seat of a member in the Exchange is property in every proper sense of the term, and can be sold, and is transferable as any other species of property having actual value as such. (*Id.*)

NOTICE OF APPEAL.

1. Upon the trial of this action the complaint was dismissed and a verdict directed in favor of the defendant; and a motion for a new trial, made upon the judge's minutes, was denied. The plaintiff appealed from the order denying the motion for a new trial, but not from the judgment. Thereafter, and after the time to appeal from the judgment had expired, upon discovering that the questions he sought to review could not be considered upon the appeal from the order, he applied for leave to amend his notice of appeal by inserting therein a notice of an appeal from the judgment as well as from the order:

Held, that as the time to appeal from the judgment had expired, the court had no power to grant the application. (*Lavelle agt. Skelly*, 24 *Hun*, 642.)

NOTICE TO QUIT.

1. When the relation of landlord and tenant does not exist between the parties, and the only issue between them is as to the title, no

demand or notice to quit need be made or given before commencing an action of ejectment. (*Eysaman agt. Eysaman*, 24 *Hun*, 430.)

OATH.

1. When a party appears before an officer duly authorized to administer oaths, and hands to such officer a declaration in writing, subscribed by him, in which declaration it is stated in substance that the party subscribing the statement verifies the same by his oath, with the intention thereby of having such officer understand that he, the party, does in fact declare to him, the officer, by written and printed words, that he verifies the same by his oath; and also with the intent to have the officer subscribe his certificate, that the statement has thus been verified, and the officer believing that the party intends to declare and does declare on oath, by written and printed words, that he verifies the statement, affixes his name to the jurat; and then after such affixing delivers it to the party, who uses it for the purpose of inducing the official action of some body or court authorized to act thereon, then an oath has in fact been administered, although the words of the oath have not been audibly uttered. (*The People agt. O'Reilly, ante*, 3.)
2. Where O'Reilly, having a claim against the board of supervisors of Albany county for certain services, delivered the same and the required affidavit as to the correctness, etc., of the bill to K., a commissioner of deeds, to have the same certified by K., as sworn to before him, intending thereby to declare to said K. that by oath he intended to verify, and did verify the statement subscribed by him, and the officer regarding him as so declaring on oath, signs

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the certificate and the jurat for the purpose of evidencing the verification, and then delivers it to the party in that form verified, and the party presents it in that form and shape to the board of supervisors for the purpose of procuring the audit of the bill:

Held, that the oath had been duly and lawfully administered. No particular form is required for a valid administration of an oath. (*Id.*)

3. The affidavit required by section 63, page 881 of 1 Revised Statutes (6th edition), to authorize the auditing of any account by a board of supervisors may be verified before a commissioner of deeds in and for said county. (*Id.*)
4. Although there might have been legal objections to the audit and allowance of the prisoner's bill; yet, as before the bill could even be considered by the board of supervisors the law required it to be verified, the affidavit was material. (*Id.*)

OPINION OF COURT.

1. While on appeal from an order which expresses the grounds upon which it was put, but the expression is coupled with phrases which create a doubt, the opinion of the court may be referred to; where no ground appears in the order it cannot be qualified in its operation and effect by reference to the opinion. (*Fisher* agt. *Gould*, 81 N. Y., 228.)

PAROL EVIDENCE.

1. This action was brought to recover \$150, rent due for the use and occupation of a cheese factory, under a written lease which provided for the use and occupation by the defendant, and in consideration thereof he promised

to pay the installment of rent which is the subject of the action. The lease is silent upon the subject of repairs, and contains no agreement on the part of the plaintiff whatever upon that subject. Defendant set up a counter-claim as a defense, alleging in substance that at the time of the execution of the lease and in consideration thereof the plaintiff promised and agreed to and with the defendant to make certain repairs, and that pursuant to said agreement plaintiff did commence such repairs but did not complete them, and that defendant completed the said repairs that the plaintiff promised and agreed, but neglected so to do, to defendant's damage of \$200. Defendant offered to prove that an agreement distinct from, but collateral to the lease offered and received in evidence, was made by and between the parties to this action respecting certain repairs that were to be made in and about the cheese factory leased to this defendant, which was rejected:

Held, that the evidence should have been received. (*Lanphire* agt. *Slaughter*, ante, 36.)

2. The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply to a collateral undertaking. Such fact is always open to inquiry, and may be proved by parol. (*Id.*)

PARTIES.

See COMPLAINT.

Pierson agt. *McCurdy*, ante, 134.

See MORTGAGE FORECLOSURE.

Franklin agt. *Hayward*, ante, 43.

PARTITION.

1. Where, in a partition suit, one of the parties in interest has in his possession a portion of the estate,

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and has been in the habit of collecting the rents, as he alleges, for the protection of the income from waste, a receiver of such property should not be appointed upon affidavit upon information and belief, that such party is of little or no responsibility. (*Darcin* agt. *Wells*, ante, 259.)

See REFERENCE.

Cassedy et al. agt. *Wallace et al.*, ante, 240.

PARTNERSHIP.

See ASSIGNMENT.

Schiele agt. *Healy*, ante, 73.

1. When the dissolution of an old firm has occurred, and a new firm has agreed to assume the liabilities of the old firm, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has notice of the dissolution and of the agreement by the new firm, to accept the liability of the new firm in place of the liability of the old. (*Register* agt. *Dodge*, ante, 107.)
2. At the time of the deposits for which this action was brought, the banking firm of J. C. & Co. was composed of several persons, among whom were J. W. S. and E. D. This firm dissolved January 1, 1871. J. W. S. and E. D. then retired from the business, and a new firm was formed, consisting of the remaining members of the old firm and two new members. The new firm succeeded to the business of the old firm, the account with the retiring members was made up and settled, and the new firm then assumed all the obligations of the old firm, and agreed that the liability of the retiring members should be terminated. The new firm continued business until November, 1873, when it was adjudged a bankrupt. Among the debts of the new firm,

published in the bankruptcy proceedings, was the debt here sued on, which debt was, without objection, proved as a debt of the new firm, in the bankruptcy proceeding of that firm, by the representative of D. R. Upon this debt so proved, dividends were, from time to time, declared out of the assets of the new firm, and the same received by the representative of D. R. In 1879, the estate of the new firm was wound up under the direction of trustees, in accordance with the provisions of the bankrupt law, and the stocks then constituting the assets of the new firm were distributed among the creditors of that firm in pursuance of a scheme assented to by the creditors. E. D. died in 1877. During his lifetime no claim of liability for the deposits was made upon him. In September, 1878, and prior to the distribution of the stocks, payment of this debt was demanded by the representative of D. R., of the executor of E. D., who then denied the existence of the debt as a liability of E. D. Thereafter the representative of D. R. participated in the distribution of the stocks belonging to the new firm, and, as a creditor of that firm, received sundry shares of various stocks, which he forthwith sold at private sale, without notice to the executor of E. D. The amount of the cash dividends received from the estate of the new firm, together with the amount realized from the sale of the stocks distributed by the direction of the trustees of that firm, not being equal to the amount of the deposits made in 1869 by D. R., this action is brought by his representative to charge the estate of E. D. with the deficiency:

Held, that by the deposit made in 1869 with the old firm J. C. & Co., E. D., then a member of that firm, became liable for the amount thereof. That liability continues, unless facts be shown from which an intention on the part of the

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creditor to accept the liability of the new firm in lieu of the liability of the old firm can be fairly inferred.

Held, further, that the circumstances in this case tends to show assent by the plaintiff to the novation of the debt sued on. (*Id.*)

3. The adoption of the new firm as the debtors, coupled with the omission, during the lifetime of the retired partner, to indicate, by word or deed, the existence of a liability on his part for the debt in question, and coupled with the lapse of time that occurred before the liability of the retired partner's estate was asserted, is sufficient to justify the inference that the new firm was adopted as debtor, with the intention that the liability of the firm was to stand in place of the liability of the old:

Held, also, that having, without cause, delayed asserting the liability of the outgoing partners during a period of some five years, whereby the party was deprived of an opportunity to take part in the bankruptcy proceedings of the new firm, and to reimburse himself from the estate of that firm the plaintiff cannot now ask a court of equity to exercise, its power in his behalf. The right here claimed is an equitable right only, and it may, therefore, be met by equitable circumstances. (*Id.*)

PAYMENT.

See **BILLS, NOTES, CHECKS AND DRAFTS.**

Briggs et al. agt. Central National Bank, ante, 250.

PAYMENT INTO COURT.

1. The old rule of the court of chancery (180) providing for the investment of funds paid into court, where no direction as to it is contained in the decree, is still

in force, modified only by the rule of the supreme court (*Rule 82, of 1871 and 1874; Rule 73 of 1877*) prescribing the place of deposit of the funds while on deposit. (*Ches-terman agt. Eyland, 81 N. Y., 398.*)

PENDENCY OF ACTION.

1. Where the complaint, after reciting the necessary facts leading thereto, prays that the rights and interests of the respective parties in certain premises and appurtenances may be determined and adjudged, and that the premises may be sold and the proceeds divided, claiming on behalf of plaintiff and another, that they are entitled to one-sixth of the net rents and income of the premises; and where the answer denies that either is so entitled:

Held, that the action is one which is brought to recover a judgment affecting the title to and the use and possession of real property, and is, therefore, embraced within the provisions of section 1670 of the Code. (*Kunz agt. Bachman, ante, 519.*)

PERJURY.

See **OATH,**

The People agt. O'Reilly, ante, 3.

PLEADING.

1. A defendant may set up in his answer any matter arising before it is put in, whether it occurred after suit brought or not. (*Reimer agt. Doerge et al., ante, 142.*)
2. Although not a plea in bar, it is an answer to the further maintenance of the suit, and, if true and sufficient, is equally effective in preventing a recovery. (*Id.*)
3. In an action brought against the defendants as sureties upon an

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undertaking on appeal, the appeal being dismissed on May 2, 1881, and by such dismissal the liability of the sureties became fixed and on the same day an execution upon the judgment was issued, which the defendant satisfied by paying the same to the sheriff on May 18, 1881. The action was commenced four days prior to such payment, and defendant pleaded as a defense the payment of the judgment debt to the sheriff:

Held, that the plaintiff having elected to try the issue and upon the trial the plea of payment as pleaded being fully proved, there must be judgment for the defendants, with costs. (*Id.*)

4. Although in an action to recover damages, alleged to have been caused by the defendant's negligence, the burden of proof is on the plaintiff to show upon the trial, by competent proof, that his negligence did not contribute in any degree to the injury complained of; yet it is not necessary for him to specifically allege these facts in the complaint. It is sufficient to aver therein that the injury and damage complained of was caused by the negligence of the defendant; the averment that the negligence of the defendant was the cause of the injury is equivalent to an averment that it was the sole cause. (*Urquhart* agt. *Ogdensburgh*, 23 *Hun*, 75.)

5. An answer denying any knowledge or information sufficient to form a belief as to the truth of material allegations of the complaint, which is verified by the defendant's attorney, who gives as a reason why the verification was not made by the defendant, that the latter was not a resident of the county in which the attorney resided, and states that the grounds of his belief were statements made to him by his client, raises an issue, and it cannot be stricken out on motion as sham:

Quære, as to the respective liability of the attorney and client in case the answer be false. (*Newberger* agt. *Webb*, 24 *Hun*, 347.)

6. In an action brought to recover the amount of a promissory note discounted by a national bank, it cannot set up by way of counter-claim or set-off that the bank, in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than that allowed by law. (*Nat. Bk. of Auburn* agt. *Lewis*, 81 *N. Y.*, 15.)

7. Although state courts have concurrent jurisdiction with the federal courts in actions by and against national banks, in an action in a state court the practice and pleadings prescribed by the legislature of the state in regard to a counter-claim or recoupment cannot be resorted to, so as to defeat the object and intention of a federal enactment. (*Id.*)

8. The provision of the United States statute (*sec.* 914), providing that the practice pleadings, forms and modes of proceedings, in civil causes, in the circuit and district courts, shall conform, as near as may be, to those existing at the time in the courts of record of the state, has no application in such case; it cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character. (*Id.*)

9. The pleadings in an action will not be amended on appeal to this court for the purpose of reversing a judgment. (*Volkering* agt. *De-Graaf*, 81 *N. Y.*, 268.)

10. Notwithstanding the liberal rule of construction applied to pleadings under the Code, the principle still remains that the judgment to be rendered by any court must be "*secundum allegata et probata.*" (*Neudecker* agt. *Kohlberg*, 81 *N. Y.*, 296.)

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11. Where a complaint states a cause of action *ex delicto* it is not competent at the trial to convert it into one *ex contractu*. (*Id.*)
12. Where the defendant in an action of divorce was in contempt because of disobedience of an order of the court directing the payment of alimony, *held*, that an order directing defendant's answer be stricken out unless he obey the previous order within five days; also an order striking out the answer upon his failure to obey, and directing a reference to take proof of the facts stated in the complaint was proper. (*Walker* agt. *Walker*, 82 N. Y., 260.)
13. Upon the trial of an action on a contract defendant moved and was permitted, without objection, to amend his answer by setting up an over-payment upon the contract and demanding judgment for the amount thereof. It was proved that said over-payment was made after the commencement of the action:
Held, that defendant was entitled to judgment for the amount of such over-payment; that under the Code of Procedure (sec. 150, subd. 1, which was in force at the time of the trial), as it was a claim arising out of the contract upon which the action was brought, it was a proper counter-claim; that defendant might have been allowed to set it up by supplemental answer (sec. 177); and that the amendment was in effect a supplemental answer, and gave the same right to judgment. (*Howard* agt. *Johnston*, 82 N. Y., 271.)
14. In an action of trespass it is not necessary, in order to recover damages which necessarily and naturally result from the injury complained of, to specifically allege them in the complaint. (*Argotsinger* agt. *Vine*, 82 N. Y., 308.)
15. In such an action defendant's answer set forth a conveyance to W., and alleged title and possession in him and his successors down to the time of the alleged trespass:
Held, that the Code of Procedure (sec. 153) did not require a reply. (*Id.*)
16. An appeal lies to the general term from an order of the special term, directing judgment for plaintiff on account of the frivolousness of defendant's answer, before the entry of judgment in pursuance thereof. (*Ethwood* agt. *Roof*, 82 N. Y., 428.)
17. But an order of general term reversing the special term order is not appealable to this court; it is in the discretion of the court below whether to pass upon the sufficiency of the answer, on motion, or to put the plaintiff to a regular demurrer. (*Id.*)
18. An averment of tender in an action admits the cause of action stated in the complaint to the amount tendered; the defendant is bound by the averment and the plaintiff or the court may accept it as an admission establishing the fact that a tender was made. (*Eaton* agt. *Wells*, 82 N. Y., 576.)
19. In an action to foreclose a mortgage, defendant W. set up in his answer a tender upon a day specified, which was after the commencement of the action, of a sum stated "in payment of the mortgage debt evidenced and secured by the bond and mortgage." The amount so alleged to have been tendered was more than the amount claimed in the complaint to be due and payable, with interest up to the time of the tender; there was no averment of tender of the costs or order for the tender of the debt without costs:
Held, that by the pleadings, if the plaintiff and the court chose to take the averments of the answer as true, there was no issue of fact to be tried; but that the tender

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alleged was insufficient, as plaintiff was entitled to costs; that plaintiff was therefore entitled to judgment; and that motion for judgment on the pleadings was properly granted. (*Id.*)

POLICYHOLDERS.

See INSURANCE (LIFE).

Bevley agt. *Equitable Life Assurance Society*, ante, 344.

PRACTICE.

1. Under the provisions of section 626 of the Code of Civil Procedure, the application to this court to vacate an injunction shall be *ex parte*, and wholly based upon the papers upon which the order was granted. The Code does not contemplate a hearing of both parties on such an application. (*Coffin* agt. *Prospect Park and Coney Island Railroad Company*, ante, 105.)

2. Where the injunction order was merely preliminary to an order to show cause why the injunction should not be continued, which order is still pending before the special term, the order of the general term should not interfere to prevent its hearing. On such hearing the parties may present additional facts affecting the right to the injunction and its continuance. (*Id.*)

3. A defendant may set up in his answer any matter arising before it is put in, whether it occurred after suit brought or not. (*Reimer* agt. *Doerge et al.*, ante, 142.)

4. Although not a plea in bar, it is an answer to the further maintenance of the suit, and, if true and sufficient, is equally effective in preventing a recovery. (*Id.*)

5. In an action brought against the defendants as sureties upon an

undertaking on appeal, the appeal being dismissed on May 2, 1881, and by such dismissal the liability of the sureties became fixed, and on the same day an execution upon the judgment was issued, which the defendant satisfied by paying the same to the sheriff on May 18, 1881. The action was commenced four days prior to such payment, and defendant pleaded as a defense the payment of the judgment debt to the sheriff:

Held, that the plaintiff having elected to try the issue and upon the trial the plea of payment as pleaded being fully proved, there must be judgment for the defendants, with costs. (*Id.*)

6. In summary proceedings by a landlord to remove a tenant, where such tenant appeared and interposed an answer that he was an infant, and asked that a guardian *ad litem* be appointed, it was probably error in the district court justice to refuse to do so, for which the proceedings should have been reversed. (*Jessurun* agt. *Mackie et al.*, ante, 261.)

7. But the remedy of the tenant was by appeal or motion to set aside the judgment, instead of an independent equitable action for a perpetual injunction against the enforcement of the order of dis-possession. (*Id.*)

8. Section 2265 of the Code of Civil Procedure prohibits the granting of an injunction in such a case as this. (*Id.*)

See EJECTMENT.

Post agt. *Moran*, ante, 122.

9. Where in a cause pending in Rensselaer county the judgment was docketed November 7, 1879, and notice of the entry thereof was served November eighth and notice of appeal was given November tenth. The sureties on the first undertaking did not justify, and one of the sureties on

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the second undertaking was rejected December second. By consent the time to give another surety was on that day extended ten days, so that the time to perfect the undertaking expired December 18, 1879. On December thirteenth a new undertaking was given, and the surety, on examination before judge DONOHUE, in New York, was rejected December 22, 1879; and on the same day the defendant obtained an *ex parte* order from judge DONOHUE, in New York, giving him twenty additional days in which to give an undertaking. On motion by plaintiff to vacate the order:

Held, that the order was irregular for the following reasons:

First. The time allowed by law for giving the undertaking having expired, the defendant could only be relieved under section 1303 of the Code of Civil Procedure, of which plaintiff was entitled to notice.

Second. The order could only be made by the court (section 1303); and that granted was a judge's order.

Third. The cause was pending in Rensselaer county and relief could only be granted in that district, or in a county adjoining Rensselaer, on notice (*Code of Civil Procedure*, section 769).

Held, further, that while the order must be vacated with costs, the defendant should be relieved on terms. Upon payment of eighty dollars costs within twenty days, the defendant has leave within the same time to perfect a new undertaking. (*Wheeler agt. Millar, ante*, 396.)

10. On March 15, 1877, the defendants John M. Fox and Frances M. Fox, his wife, executed a mortgage upon a farm of 150 acres belonging to John M. Fox to the plaintiff's testator. Thereafter, and on January 16, 1879, Fox conveyed 100 acres of the land, through a third person, to his wife. On February 1, 1879, four

judgments were docketed against John M. Fox, one in favor of the defendant Kannady and three others in favor of persons who thereafter assigned them to him. On February fourteenth, another judgment was docketed against him in favor of the defendant Ivers. In this action, brought to foreclose the said mortgage, the defendant Kannady was served with the summons and the usual notice of object of action, but did not appear or answer. The defendant Frances M. Fox answered and asked that the 100 acres conveyed to her be sold last, and the defendant Ivers answered alleging that the conveyance to her was fraudulent as against creditors. Upon a trial had before a referee he directed a judgment to be, and the same was, by a stipulation of the attorneys, entered, directing a foreclosure of the mortgage and a sale of the premises; that out of the surplus moneys there be paid to Ivers the amount of his judgment and sixty-five dollars costs, and that the balance be paid to Frances M. Fox. No application was made to the court in reference to the entry of a judgment against the defaulting defendant.

Upon an appeal by the defendant Kannady from an order denying a motion to vacate or modify the judgment and set aside a sale had thereunder:

Held, that Kannady did not waive his right to contest the validity of the conveyance from Fox to his wife by failing to appear and answer, but was entitled to raise and try that question upon the hearing upon a reference to determine as to the distribution of the surplus moneys. (*Rogers agt. Ivers*, 23 Hun, 424.)

11. That as no copy of the answer of the defendants Fox and Ivers had been served upon him, and as he had not appeared or been heard before the referee, and as the judgment had been entered without any application having

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been made to the court, the judgment, in so far as it directed the surplus moneys to be paid to Ivers and Fox instead of being brought into court, was irregular and unauthorized.

That the sale should be allowed to stand, but that the defendants Ivers and Fox should be compelled to pay the surplus moneys received by them into court, and that Kannady should be allowed to apply for the appointment of a referee to hear and determine all claims thereto. (*Id.*)

12. Upon the trial of the plaintiff in error, for murder, he was sworn and testified in his own behalf. Thereafter the court, after commenting on the right of one accused of crime to testify in his own behalf, and of the right of the jury to accept that part of such testimony as they believed to be true, and to reject that which they believed to be false, said, "when a party in a civil action deliberately swears false to one material part of his testimony, and the jury are satisfied that he has so sworn falsely, intentionally false, they are not only at liberty to reject it, but it is sometimes the duty of the jury to reject the whole. The maxim is *falsus in uno falsus in omnibus*."

Held, that there was no error in the charge, as it properly left the decision of the question as to whether or not the whole testimony should be disregarded to the judgment of the jury, to be formed upon the whole case.

Semble, that if the court had omitted the word "sometimes," and if the charge could be considered to apply to the present case, and not solely to civil actions, it would have been erroneous, as making an absolute rule of law out of that which is only a wise maxim, to be applied discreetly by the jury, according to their judgment in each case. (*People agt. Moett*, 23 *Hun*, 60.)

13. Evidence of a prisoner's good character is admissible in all criminal cases, and it is to be considered by the jury, whether the evidence of the prisoner's guilt be doubtful and uncertain, or strong and conclusive, but in the latter case it is of comparatively little importance. (*Id.*)

14. The notice of a mechanic's lien filed under section 1, chapter 305 of 1844, as amended by chapter 872 of 1871, takes the place of a complaint, and is subject to the rules governing pleadings in other actions. The lien ceases if judgment is not entered within the year. The court cannot extend the time. (*Dart agt. Fitch*, 23 *Hun*, 361.)

15. On February 23, 1865, the plaintiffs' assignor, Schell and others, signed an agreement, by which they agreed to pay the amounts set opposite to their names, for the purchase of certain real estate, to Daniel Devlin, the payments to be made to said Devlin, the defendants' testator, in whose name the title of the property was to be taken, the property to be put into an association for its development, upon such terms as the subscribers might thereafter elect. On February 12, 1875, this action was brought to compel the said Devlin's executors to account for the moneys received and expended by him under the agreement:

Held, that the plaintiffs had no right to bring an action at law upon the agreement, and that as their only remedy was in equity the ten and not the six years' statute of limitation was applicable to the claim. (*Rodman agt. Devlin*, 23 *Hun*, 590.)

16. In 1867 Getty, one of the subscribers, brought an action against Devlin, to which all the other subscribers were made parties, in which he asked for a general accounting, and that the share of

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each party, including that of Schell, the assignor of the plaintiffs in the present action, should be ascertained and determined. In that action Schell interposed no answer. Subsequently an order was made therein allowing the complaint to be amended, and limiting the benefit of the action to the plaintiff and those defendants who had answered therein:

Held, that the judgment entered therein did not bar Schell or his assignees from maintaining this action. (*Id.*)

17. To this action, brought by the plaintiff to foreclose a mortgage given by one C. S. Lester, Lucy C. Lester, his wife, C. S. Grant and E. M. Harris were made parties defendants, the complaint containing the usual allegations that they held interests or liens which had accrued subsequently to the lien of the plaintiff's mortgage. Grant appeared, but did not answer. Lucy C. Lester and Harris appeared and answered, denying that their liens were subsequent to that of the mortgagee, and demanded and obtained a judgment declaring that the inchoate right of dower of Lucy C. Lester, and a mortgage held by her, and a judgment held by Harris, were prior and superior to the plaintiff's mortgage, and directing the premises to be sold subject to their said liens.

Upon an appeal from an order denying a motion made by Grant to have the clause establishing the priority of the liens of Lester and Harris stricken from the judgment, and to have the sale set aside, *held*, that it was not necessary for Lester or Harris to have answered, setting up the priority of their respective liens, as the entry of the usual judgment of foreclosure and a sale thereunder would not have cut them off if they were prior in fact. (*Payn* agt. *Grant*, 23 *Hun*, 134.)

- 18 That upon their serving an-

swers, setting up the priority of their liens over that of the plaintiff, the court should have dismissed the complaint as to them, but should not have rendered a judgment establishing the priority and amount of their liens as against the defendant Grant. (*Id.*)

19. *Quare*, as to whether the defendants Lester and Harris could, by serving their answer upon the defendant Grant, as provided by section 521 of the Code of Civil Procedure, have litigated and established the priority of their liens in this action. (*Id.*)

20. The plaintiff, one of the defendant's employes, brought this action to recover damages for injuries occasioned by a collision between the car in which he was riding and one in another train. The defendant claimed and the plaintiff denied, that at the time of the accident the plaintiff's arm was outside of the widow by which he was seated. The judge submitted to the jury four questions, which they were directed to pass upon in addition to their general verdict; the first involving the question of the plaintiff's contributory negligence, and the other three the negligence of the defendant in employing certain persons named, and the negligence of one of such employes. After retiring, the jury asked whether they were at liberty to find a general verdict, without passing on the special questions submitted to them, and were informed that if they could agree on a general verdict and could not agree on the special findings, they might find such a verdict and come into court and report, and the court would do what it thought proper. Thereafter the jury found a general verdict for the plaintiff for \$6,000, and stated that they could not agree as to the special findings. The defendant's counsel excepted to the verdict as irregular, and moved to set it aside:

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Held, that the reply of the court to the question of the jury was not equivalent to a withdrawal of the special questions submitted to them, nor was the failure of the counsel for the defendant to except to what the court then said, a waiver of his right to object to the rendering of a general verdict alone. (*Ebersole* agt. *Northern Central R. R. Co.*, 23 *Hun*, 114.)

21. That as there was nothing to show that the jury had agreed in deciding the first of the questions submitted to them (that relating to the plaintiff's contributory negligence), in favor of the plaintiff, a general verdict in his favor could not be sustained.

Quære, as to whether, after special questions have been submitted to a jury, they can be withdrawn, without the consent of the parties, when the jury intimate that they cannot come to an agreement thereupon, and as to whether, in any case, a general verdict and a report that they cannot agree on the special findings can be allowed to stand. (*Id.*)

22. Upon the trial of this action, brought by the plaintiff to procure a limited divorce from the defendant on account of his cruel treatment of her, it appeared that for some time previous to December 10, 1877, she had been in the habit of having illicit intercourse with one Platz, having visited him at his market for that purpose, and having sent to him by the hands of her daughter, a girl about eleven years old, notes asking for interviews and expressing her love and her desire to be with him. On December tenth of these notes to the defendant, and informed him that she had previously carried similar notes to Platz. The cruel acts complained of took place on that and the following day, and on or about the twenty-fourth, twenty-seventh and twenty-ninth of that month,

and were caused by the discovery of the plaintiff's adultery. On April sixteen the plaintiff went away from the defendant, and has since been living apart from him in another city:

Held, that the plaintiff was not entitled to maintain the action, nor to have any allowance made to her for her support. (*Doe* agt. *Roe*, 23 *Hun*, 19.)

23. The adultery of the wife is "ill conduct" within the meaning of those terms as used in section 53 of 2 Revised Statutes, 147, authorizing the defendant, in an action for separation, to prove ill conduct on the part of the complainant. (*Id.*)

24. *Quære*, as to whether or not, under the present practice, a cause of action for a divorce, on the ground of adultery, can be united with one for a limited divorce, on the ground of cruel treatment. (*Id.*)

25. This action was brought by the stockholder of a national bank against the bank, a receiver thereof, appointed by the comptroller of the currency, and its directors, the complaint charging the directors with misconduct and neglect in discharging the duties of their office, to the damage and injury of the bank; it also alleged that the plaintiff had demanded of the receiver that he should bring an action against the directors for the said causes, and that he had refused to do so:

Held, that as, under section 5234 of the United States Revised Statutes, a direction from the comptroller is required to authorize a receiver to bring an action, the complaint was defective in not alleging a demand upon the comptroller for and a refusal by him of a direction requiring the receiver to bring the said action. (*Brinkerhoff* agt. *Bostwick*, 23 *Hun*, 237.)

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26. *Semble*, that an improper refusal on the part of the comptroller of the currency to prosecute or direct the receiver to prosecute such an action, would authorize the stockholders to sue in their own behalf in a state court, making the corporation a party defendant to the action. (*Id.*)
27. Upon the hearing of a motion for leave to enter judgment upon the report of a referee appointed to hear and determine the issues in an action for divorce, on the ground of adultery, the court cannot set aside the report on the ground that the evidence is insufficient to sustain the findings, and direct a judgment to be entered in favor of the party against whom the referee awarded a judgment. (*Schroeter* agt. *Schroeter*, 23 *Hun.*, 230.)
28. The legislature by requiring, by section 1229 of the Code of Civil Procedure, that the judgment in matrimonial actions, where a reference of the issues has been ordered, must be rendered by the court, did not intend to authorize the court to examine the evidence, and to render such judgment as it should justify, but only required the approval of the court as a safeguard against irregularity, fraud or collusion. (*Id.*)
29. The complaint alleged that in pursuance of a conspiracy between the defendants, two of them had, by fraudulent representations, procured from the plaintiff in Belgium, \$17,000, and transmitted the same by the mail in registered letters, addressed to the other defendants in Brooklyn and New York; that these letters, with their contents, were at the post-office in Brooklyn and New York, and that the defendants, who were irresponsible, had made demands upon the post-masters therefor.
Held, that an injunction, restraining the defendants from demanding or receiving any of the said registered letters, was properly granted. (*Zellenkoff* agt. *Colins*, 23 *Hun.*, 156.)
30. The complaint and the affidavit upon which the order was made were verified by the Belgian consul in New York, and all the allegations thereof were upon information and belief. Upon the hearing of a motion to vacate the injunction, which was made upon the original papers only, the plaintiff was allowed to read depositions taken in Belgium, they being the sources from which the consul had derived his information and formed his belief as to the facts set forth in the complaint and affidavit.
Held, no error. (*Id.*)
31. Where, in an action brought to foreclose a mortgage, issues of fact are framed and, in pursuance of an order to that effect, tried by a jury, a motion for a new trial on a case and exceptions, founded upon irregularities committed on the trial by the jury, must be made before the entry of judgment in the action, otherwise the findings of the jury will be deemed to have been acquiesced in, and questions of fact involved therein cannot be reviewed on an appeal from the judgment. (*Chapin* agt. *Thompson*, 23 *Hun.*, 12.)
32. Where, after giving a mortgage to secure a usurious loan, the mortgagor subsequently executes to the mortgagee, who still holds the mortgage, a general assignment of all his property in trust to pay his debts, and in an inventory of his property and debts, subsequently made thereunder, recognizes the mortgage as a valid lien, and the debt it was given to secure as a valid debt, he is not thereby estopped from setting up the defense of usury in an action brought to foreclose the mortgage, by the mortgagee or his assignee, where there is no proof that the latter took the assignment on the faith of such recognition. (*Id.*)

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33. On April sixth the defendant's attorney, whose time to answer expired April eleventh, applied for an extension of time to the plaintiff's attorney, who thereupon signed the following written stipulation: "The time for the defendant, Dennis J. O'Connor, to answer the within complaint is hereby extended twenty days. Dated N. Y., April 6, 1880." The plaintiff's attorney having refused to receive a demurrer served by the defendant's attorney on April thirtieth, on the ground that the time to demur had expired, the defendant moved for an order requiring the plaintiff to receive the demurrer, which was denied:

Held, That the stipulation extended the time twenty days from April eleventh, and that the demurrer was served in time. (*Pattison* agt. *O'Connor*, 23 *Hun*, 307.)

34. That the defendant was entitled to move for an order requiring the plaintiff to receive the demurrer, and that the order denying the motion was appealable. (*Id.*)

35. In an action brought by the Cowdreys against one Watson, to recover the value of legal services rendered by the former, Watson set up as a counter-claim that the Cowdreys had retained possession of, and refused to surrender up, certain abstracts of title and searches belonging to him. Upon the trial, upon Cowdrey's objecting to the counter-claim on the ground that it was founded upon a tort, and did not grow out of the same transaction upon which their claim was founded, the court, with the consent of Watson, struck out the counter-claim, and thereafter a judgment was rendered in that action in favor of Watson.

This action was brought by Watson against the Cowdreys, to recover damages for the conversion of the said abstracts:

Held, that the former judgment was not a bar to the maintenance of this action, and that he was

properly allowed to recover as damages the cost of procuring other searches, similar to those so detained. (*Watson* agt. *Cowdrey*, 23 *Hun*, 169.)

36. By the judgment entered in this action, brought to obtain a construction of the will of one Emily Allen, the plaintiff, as her executor, was directed to pay to the defendant, her residuary legatee, the sum of \$8,051.59, the residue of the personal estate in his hands, and to deliver to her a certain mortgage for \$1,500, with the bond accompanying the same, if there were any such bond. Upon an affidavit showing a refusal of the plaintiff to comply with the provisions of the said judgment, after due demand made, an order was granted adjudging him to be guilty of a contempt, and ordering a precept to issue to the sheriff to take the plaintiff and actually confine and detain him in the jail until he should be discharged by due course of law:

Held, that, in so far as the order adjudged the plaintiff to be guilty of contempt in refusing to deliver the mortgage to the defendant, it was proper and should be affirmed, but that as to the residue it should be reversed.

A party cannot be adjudged guilty of a contempt, and confined to a jail as a punishment therefor, for any disobedience of a judgment or order, where by law an execution can be issued for the purpose of enforcing the judgment or order which has been disobeyed. (*Baker* agt. *Dejonge*, 23 *Hun*, 357.)

37. In proceedings to punish a defendant for contempt, for violating an injunction restraining him from collecting the rents of certain premises during the pendency of an action, brought to foreclose a mortgage thereon, the court can only impose such a fine as shall be sufficient to indemnify the party aggrieved for his actual loss

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and injury, and to satisfy his costs and expenses in the proceedings. (*Dejonge* agt. *Brenneman*, 23 *Hun*, 332.)

38. The amount of the loss and injury must be established by the same proof as would be required in an action at law to recover the damages sustained. (*Id.*)

39. One Anderson having been arrested by a constable by virtue of an execution against his person, issued upon a judgment recovered by the plaintiff, was allowed by the constable to go at large upon his promise to appear the next morning and give bail. On the next day the constable not finding Anderson left the execution at the sheriff's office, where it was received by a deputy who found Anderson and told him that he had the execution and had come after him, whereupon Anderson voluntarily went with him to the jail and there gave bail for the limits. Anderson having afterwards gone beyond the jail limits this action was brought against the sheriff for an escape:

Held, that although after the voluntary escape suffered by the constable the sheriff had no right forcibly to take and detain Anderson under the execution, yet that upon his voluntarily surrendering himself to the deputy the sheriff had the right to receive him and was liable for his subsequent escape. (*Stickle* agt. *Reed*, 23 *Hun*, 417.)

40. Upon the trial of an action brought by the administrator of a deceased payee of a promissory note against the makers thereof, one of whom claimed to be liable as a surety only and the other of whom interposed no defense, the latter was allowed, against the plaintiff's objection and exception, to testify in behalf of his co-defendant as to personal transactions and communications had by the witness with the deceased:

Held, that the testimony was inadmissible under sections 828 and 829 of the Code of Civil Procedure. (*Hill* agt. *Hotchkin*, 23 *Hun*, 414.)

41. Where an action is brought by a judgment creditor to reach certain shares of mining stock, claimed to belong to the judgment debtor, but which are at the time of the commencement of the action standing on the company books in the name of his wife, the creditor has such "an apparent right to or interest in" the stock, as to entitle him to apply, under section 713 of the Code of Civil Procedure, for the appointment of a receiver thereof, when there is reasonable ground to apprehend that before the suit can be determined the stock will be removed beyond the jurisdiction of the court, or lost in some adverse turn of the defendant's affairs.

The fact that a receiver of the judgment debtor's property has already been appointed in proceedings supplementary to execution, does not bar such an application, nor does it make it necessary that the same receiver should be appointed in granting it. (*State Bank of Syracuse* agt. *Gill* and another, 23 *Hun*, 410.)

42. In this action, brought by the plaintiff upon several promissory notes, given for money loaned and beer sold to the defendant, the defendant Soule was arrested in pursuance of an order granted on the ground that the plaintiffs were induced to loan the money and sell the beer by means of false and fraudulent representations made by him; and a motion subsequently made by him to have the order vacated was denied. After the judgment was recovered herein, Soule procured a discharge from his debts from the Court of Common Pleas under the two-thirds act. In the schedule accompanying the petition he stated the cause and consideration of the

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debt to the plaintiff as follows, viz., "notes and open account for money loaned and interest thereon:"

Held, that the true cause and consideration of the indebtedness was sufficiently set forth to confer jurisdiction over the proceedings upon the court of common pleas, and that upon producing his discharge he was entitled to an order perpetually staying all proceedings under the judgment herein, and ordering the same to be marked "satisfied by the defendant's discharge in insolvency proceedings." (*Schaeffer agt. Soule*, 23 Hun, 583.)

43. On March 5, 1880, the plaintiff recovered a judgment for \$5,000 against the defendant for the negligent killing of her intestate on May 12, 1873:

Held, that under chapter 78 of 1870 she was entitled to recover interest upon that amount from the time of the death to the time of the rendering of the verdict. (*Erwin agt. Nevcrsink Steamboat Co.*, 23 Hun, 578.)

44. That the liability of the defendant, for the damages occasioned by the negligent killing of the intestate, was an "obligation" within the meaning of that term, as used in the exception contained in the act reducing the rate of interest on money to six per cent (*chap. 538 of 1879*), which provided that nothing therein contained should "be so construed as to in any way affect any contract or obligation made before the passage of this act."

That the interest should be computed at the rate of seven per cent up to the time of the rendering of the verdict. (*Id.*)

45. A commission may be issued to take the testimony of one committed to a lunatic asylum in another state, on the ground of insanity, but upon the trial of the action the return thereto must be first submitted to the presiding jus-

tice, who shall determine, on an examination of the answers therein contained, and of such witnesses having knowledge of the subject, as may be produced before him, whether or not the mental condition of the witness is such as to render his testimony admissible in evidence. (*Hand agt. Burrows*, 23 Hun, 330.)

46. Where, in an action brought by vendees to enforce the specific performance of a contract for the exchange of real estate, the court, on account of the refusal of the vendor's wife to join in the conveyance of one of the pieces, refuses to decree a specific performance but retains the action for the purpose of determining and awarding to the plaintiffs the damages occasioned by the breach of the contract, it may, in case the vendor becomes insolvent and makes a general assignment during the pendency of the action, direct that the judgment be declared a lien on the premises which were to have been conveyed, and direct that the same be sold for the payment of the amount thereof. (*Price agt. Palmer*, 23 Hun, 504.)

47. When, after the death of a sole defendant in an action of replevin, his administrator has, by an order entered upon the written stipulation of the parties, been substituted in his place, and the parties have thereafter voluntarily appeared before the court and proceeded with the trial, it is too late for the plaintiff to apply for leave to discontinue the action on the ground that it abated by the death of the defendant.

Semble, that under the Revised Statutes and Code of Civil Procedure an action of replevin does not abate upon the death of a sole defendant. (*Roberts agt. Marsen*, 23 Hun, 486.)

48. Under chapter 238 of 1853 an heir-at-law may maintain an action for the partition of lands, whereof

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the deceased died seized, and to procure a judgment declaring invalid and void a devise contained in his will, under and by virtue of which his widow is then in the possession and occupation of the lands, claiming title thereto. (*Ward agt. Ward*, 23 *Hun*, 431.)

49. This act cannot be held unconstitutional on the ground that it allows the question of title to be tried in an action for partition, as a party thereto may, if he so desire, have the issues arising therein settled and tried by a jury on making a timely demand therefor. (*Id.*)

50. The plaintiff having recovered a judgment against the defendant, Wm. D. Bruns, in the district court of the United States for the southern district of New York, and having had an execution, issued thereon to the United States marshal, returned unsatisfied, brought this action to have certain voluntary conveyances of real estate made by the said Bruns set aside as fraudulent and void as against him:

Held, that as the plaintiff had not exhausted his remedy at law by the recovery of a judgment against the defendant in one of the courts of this State, and the return unsatisfied of an execution issued upon it, the action could not be maintained. (*Davis agt. Bruns*, 23 *Hun*, 648.)

51. This action was noticed for trial by both parties for the February Term, 1878. In June, 1878, a motion made by the defendant was denied, with ten dollars costs, which have never been paid. In February, 1879, the action was reached upon the calendar, and on the plaintiff's failing to appear, a judgment by default was taken by the defendant:

Held, that the failure of the defendant to pay the costs awarded against him, operated, under section 779 of the Code of Civil Pro-

cedure, to stay all proceedings on his part; that he had no power to move for a dismissal of the complaint, and that the judgment should be set aside as entirely unauthorized. (*Brown agt. Griswold*, 23 *Hun*, 618.)

52. In an action brought by a judgment creditor, against one to whom the debtor had conveyed a portion of his real estate, to procure a judgment setting aside the conveyance as fraudulent and void, declaring the judgment a lien upon the premises conveyed, and appointing a receiver to sell the same, the complaint must allege that an execution has been issued upon the judgment and returned unsatisfied in whole or in part. It is not sufficient to allege the death of the judgment debtor, and that from the time of the entry of the judgment until his death he was wholly insolvent, and had neither real nor personal property from which any part of the judgment could be collected. (*Adsit agt. Sanford*, 23 *Hun*, 45.)

53. A county court has no power to set aside, on a motion, a sale made by an assignee for the benefit of creditors, on the ground that the price paid was insufficient, and that a better one can be obtained.

Semble, that, upon the accounting of the assignee, the county court could charge him with any loss occasioned by his wrongdoing in making a sale at an inadequate price. (*Matter of Rider*, 23 *Hun*, 91.)

54. An order of the county court, setting aside such a sale on a motion, is appealable to the General Term. (*Id.*)

55. The circumstances under which a court will not set aside a judicial sale considered. (*Id.*)

56. The defendant, J. K. Merritt, owning a piece of land, upon which was a mortgage for \$1,500,

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and his wife owning, as her separate estate, another piece upon which was a mortgage for \$2,200, joined in executing a mortgage upon the two pieces, to secure the payment of their joint bond for \$4,000, the amount procured thereby being applied to the payment of the two mortgages.

In an action brought to foreclose the mortgage, *held*, that as part of the money went for the benefit of her separate estate, a personal judgment for any deficiency that might arise on the sale was properly rendered against her. (*Jones agt. Merritt*, 23 *Hun*, 184.)

57. To authorize the granting of an order for the examination of a party before trial, the affidavit must specify the facts and circumstances showing the testimony of the party to be material and necessary. It is not sufficient to allege that the testimony is material and necessary for the party making the application and the prosecution of the action, and that the applicant cannot safely proceed to trial without examining him.

What statement of facts is insufficient. (*Crooke agt. Corbin*, 23 *Hun*, 176.)

58. This action was brought by an insurance company to compel persons who had recovered a judgment against it, to interplead with others who claimed to be assignees of, or to have acquired liens upon the said judgment. The plaintiff, the judgment-creditors and all of the defendants except two, were residents of this State:

Held, that the action could not, upon the petition of one of the non-resident defendants, be removed to the United States district court under the act of congress passed in 1875 (*Sec. 2 of chap. 139*). (*Republic Fire Ins. Co. agt. Keogh*, 23 *Hun*, 644.)

59. Where counsel have appeared and presented claims, in behalf of their clients, against funds in the

hands of a receiver of an insolvent life insurance company, and the claims have been rejected, and the orders rejecting them have been reviewed and affirmed, upon appeals taken therefrom to the general term of the court of appeals, and neither of the courts have ordered that costs of the proceedings or of the appeals should be paid to such claimants, the special term should not grant an application made to it by the counsel for the unsuccessful claimants for an order granting them allowances in the nature of costs. (*People agt. Security Life Ins. and Annuity Co.*, 23 *Hun*, 596.)

60. Under section 1247 of the Code of Civil Procedure a referee, appointed to sell real estate in pursuance of a judgment, may appeal from an order fixing his fees and compensation for the services so rendered by him. (*Hobart agt. Hobart*, 23 *Hun*, 484.)

61. Where a verdict is rendered in favor of the defendants, in an action brought against them to recover damages for false and fraudulent representations alleged to have been made by them, and they have appeared therein by separate attorneys and served separate answers setting up the same defense, each defendant so appearing is entitled, in the absence of evidence showing that he has severed in his defense in bad faith and with intent to increase the costs, to tax a separate bill of costs against the plaintiff. (*Royce agt. Jones*, 23 *Hun*, 452.)

62. In an action brought by a father, as the administrator of his deceased child, a healthy boy of about six years of age, to recover damages occasioned by his having been killed through the defendant's negligence, the absence of proof of any special pecuniary damage resulting from his death will not justify the court in non-suiting the plaintiff, or in direct-

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ing the jury to find a verdict for nominal damages only. (*Gorham* agt. *N. Y. C. and H. R. R. Co.*, 23 *Hun*, 449.)

63. An affidavit of merits in which the defendant states that "he has a good and valid defense to the whole of the *plaintiff's claim as set forth in said complaint* upon the merits thereof," is defective and insufficient; it should state that the defendant "has a good and substantial defense on the merits in this cause."

An affidavit is also defective which fails to state that the counsel, whose advice is sworn to, is the counsel of the defendant in the action in which the affidavit is made. (*State Bank of Syracuse* agt. *Gill*, 23 *Hun*, 406.)

64. In an action brought by the administrator of a deceased person to recover articles of personal property alleged to form part of his estate, where equitable relief by way of an injunction and the appointment of a receiver is demanded, the plaintiff has no right to a trial by jury, unless the defendant consent thereto, unless issues be framed and settled in accordance with the usual practice in equity cases. (*Ward* agt. *Plato*, 23 *Hun*, 402.)

65. In an action brought in the supreme court to restrain the foreclosure by advertisement of a mortgage, a county judge may grant an order requiring the defendant to show cause before him why a temporary injunction should not be granted, and restrain him in the meantime from selling the premises at the time specified in the advertisement. (*Babcock* agt. *Clark*, 23 *Hun*, 391.)

66. Where a judgment has been entered upon an order confirming the report of a referee, to whom disputed claims against an estate have been referred in pursuance of sections 36 and 37 of 2-Revised

Statutes, 88, the court may, upon a motion made upon a case prepared and settled as required by the Code of Civil Procedure, set aside the judgment and grant a new trial. (*Young* agt. *Cuddy*, 23 *Hun*, 249.)

67. On an application for an order directing the service of the summons by publication, in an action commenced in July, 1877, an affidavit was presented which alleged "that the defendant has not resided within the State of New York since March, 1877:"

Held, that this allegation was sufficient evidence of the plaintiff's inability, after due diligence, to find the defendant within the state, and was sufficient to confer jurisdiction upon the court to make the order. (*Carleton* agt. *Carleton*, 23 *Hun*, 251.)

68. An action to obtain the construction of a will is not a proper one in which to determine the claim of a receiver, appointed in proceedings supplementary to execution, issued upon a judgment recovered against one of the legatees, since deceased, to the share of the judgment debtor in the estate. (*Smith* agt. *Edwards*, 23 *Hun*, 232.)

69. Under section 999 of the Code of Civil Procedure, a party may move for a new trial on the ground that the verdict is contrary to law, and upon an appeal from an order denying such a motion the whole case is before the appellate court, upon the law as well as the facts. (*Tate* agt. *McCormick*, 23 *Hun*, 218.)

70. No appeal lies from an order refusing to confirm the report of a referee, appointed by an interlocutory judgment to take proof of certain facts and report the same to the court before which an action is being tried, to enable it to make and render a final judgment therein, when such refusal is based

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- upon the insufficiency of the report, and is accompanied by an order requiring the referee to furnish more specific facts. (*Kent* agt. *Quicksilver Mining Co.*, 23 *Hun*, 199.)
71. A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment, if it allege that he is confined in the county jail, by virtue of an execution against his person, issued in a civil action brought by a plaintiff therein named. (*Matter of Chappell*, 23 *Hun*, 179.)
72. Under section 1019 of the Code of Civil Procedure either party may terminate the reference, unless the referee has, within sixty days from the time when the cause was finally submitted to him, made his report and filed the same with the clerk, or delivered it to the attorney for one of the parties; it is no longer sufficient for him to have made his report and notified the party in whose favor it was made that it was ready for delivery. (*Phipps* agt. *Carman*, 23 *Hun*, 150.)
73. Cost, in excess of the amounts allowed by law, cannot be taxed by the agreement of the attorneys for the parties to the action. (*O'Keefe* agt. *Shipherd*, 23 *Hun*, 171.)
74. When a debtor has promised to pay a debt from which he has been discharged by proceedings in bankruptcy, an action will lie upon the original debt, and need not be brought upon the new promise. (*Graham* agt. *O'Hern*, 24 *Hun*, 221.)
75. After a trial had been commenced before a jury and the plaintiff had rested his case, the questions of law were, at the suggestion of the court, submitted to it for decision, and the jury was thereupon discharged without objection. The court subsequently made and filed findings of fact and of law, and decided the case in favor of the plaintiff:
Held, that the defendant could not complain on appeal that he had been deprived of his right to a trial by a jury. (*Id.*)
76. That not having stated at the trial that he desired to introduce further testimony that he could not complain on appeal that he had been deprived of the right to do so. (*Id.*)
77. Where, upon the face of the complaint, it appears that the plaintiff, claiming to be the owner of a one-third interest in a chattel, has brought an action to recover damages for the conversion of the said interest by the defendant, an objection to his omission to make the owners of the remaining two-thirds of the chattel parties to the action, must be taken by demurrer or it will be waived. (*Maxwell* agt. *Pratt*, 24 *Hun*, 448.)
78. *Quære*, whether, where an owner of an undivided one-third of a chattel brings an action to recover damages for the conversion thereof, and the defendant has committed no trespass upon the rights of the owners of the other two-thirds of the chattel, but acknowledges their rights and only claims to be a joint owner with them, it is necessary for the plaintiff to make the owners of the other two-thirds parties to the action? (*Id.*)
79. An answer setting up a defect of parties plaintiff must give the names of the necessary parties if they be known to the defendant. (*Id.*)
80. One John Olcott, claiming to be in possession of a certain piece of land and to be a tenant of Adelaide Olcott, brought an action in a justice's court to recover damages for a trespass

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committed thereon by one Masten. Masten alleged, and upon the trial offered to prove, that he had been in possession of the land for twenty years; but upon Olcott's objecting that it would bring the title to land in dispute, he withdrew this defense, and judgment was entered in Olcott's favor. Nothing was litigated before the justice but Olcott's actual occupation and the amount of damages sustained. Thereafter this action was brought by Masten against John and Adelaide Olcott to recover the land:

Held, that this action was not barred by the former judgment, as the question of title was not in any way involved or determined therein. (*Masten agt. Olcott*, 24 *Hun*, 587.)

81. That Masten did not waive or in any way prejudice his rights by withdrawing his offer upon Olcott's objecting, instead of giving an undertaking and removing the action into another court. (*Id.*)

82. An order allowing an open commission to issue, as authorized by sections 893 and 894 of the Code of Civil Procedure, is not appealable to the general term. (*Jemison agt. Citizens' Savings Bank*, 24 *Hun*, 350.)

83. Although a judgment of a justice's court for nominal damages only, will not in some cases be reversed by the county court, though it is erroneous, yet this rule does not apply to an erroneous judgment in favor of one whose suit was both vexatious and groundless. (*Countryman agt. Lighthill*, 24 *Hun*, 405.)

84. After an action had been referred, the evidence taken and the case finally submitted to the referee for his decision on the merits, the court granted an order bringing in other parties as defendants, and directing that the cause re-

main and continue for trial before the referee the same as if the parties added had been parties from the beginning of the action, they to have the privilege, however, of cross-examining the witnesses produced and examined on the trial. It did not appear that the case was one which could have been referred without consent:

Held, that conceding the court had power to bring in the new parties, the residue of the order was erroneous, as the court could not compel them to accept the referee or the evidence taken; that they had at least the right to be heard as to the appointment of a referee, and the right to be present when the witnesses were sworn and examined. (*Wood agt. Swift*, 81 *N. Y.*, 31.)

85. The action was to determine the title of conflicting claimants to a policy of life insurance; the insurance company was a party defendant; one of the parties so brought in had commenced a suit against said company; the order restrained the prosecution of said action:

Held, error; that if for any reason he ought not to proceed, the company could have his proceedings stayed in that action. (*Id.*)

86. Where a case presents a question of law solely upon uncontroverted facts, and a verdict merely formal is directed for plaintiff, it is not error for the trial court, in setting aside the verdict on motion, to direct final judgment for the defendant, at least where no objection to this course is made at the time. (*Hall agt. Hall*, 81 *N. Y.*, 131.)

87. After judgment has been entered upon an order overruling a demurrer without leave to plead to the merits, or with leave not availed of, the court, in the exercise of its discretion, will not, as a general rule, grant leave to withdraw the demurrer and to plead. (*Fisher agt. Gould*, 81 *N. Y.*, 228.)

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88. As there are special statutes and a general statute authorizing the formation of associations having a right to offer premiums or rewards for such contests, a party seeking to avoid a contract to pay for services in driving a horse in trotting races, as coming within the prohibitions of the statute, must aver and prove that the services were contracted to be rendered at a place, and in trotting for prizes or rewards not within the exception of the statute. (*Harris* agt. *White*, 81 N. Y., 532.)

89. On appeal to this court from a judgment entered on a decision of the court or the report of a referee, no fact can be considered for the purpose of reversing a judgment unless it is either stated in the findings, or was requested to be found on uncontroverted evidence. (*Thomson* agt. *Bk. of British N. Am.*, 82 N. Y., 1.)

90. The decision of the general term herein was filed nearly two years, and the appeal to this court was taken more than one year ago. The respondents' counsel requested, in case the court reached a conclusion different from that of the general term, that it would suspend its decision, to give opportunity to apply to that court for an order showing that the reversal was upon the facts as well as the law. It did not appear that the reversal was upon the facts:

Held, that the request could not be granted; that it would not be proper to allow a new decision to be made by the court below to defeat the appeal; and that if the reversal was upon the facts, the respondents should have taken proceedings before the argument and submission of the case to procure an amendment of the order of general term. (*Hamlin* agt. *Sears*, 82 N. Y., 327.)

91. In an action to foreclose a mortgage, defendant W. set up in his answer a tender upon a day speci-

fied, which was after the commencement of the action, of a sum stated "in payment of the mortgage debt evidenced and secured by the bond and mortgage." The amount so alleged to have been tendered was more than the amount claimed in the complaint to be due and payable, with interest up to the time of the tender; there was no averment of tender of the costs or order for the tender of the debt without costs:

Held, that by the pleadings, if the plaintiff and the court chose to take the averments of the answer as true, there was no issue of fact to be tried; but that the tender alleged was insufficient, as plaintiff was entitled to judgment; and that motion for judgment on the pleadings was properly granted. (*Eaton* agt. *Wells*, 82 N. Y., 576.)

92. Also *held*, that no findings of fact were required as there was no trial of an issue of fact; and that an order for judgment was a sufficient decision in writing to meet the demands of section 1010 of the Code of Civil Procedure. (*Id.*)

93. Defendant moved for and obtained an order of special term to set aside the judgment:

Held, that, conceding the order for judgment was not sufficient within said section, defendant's practice was not correct; that his remedy was, as prescribed by said section, to move for a new trial on that ground. (*Id.*)

PROMISSORY NOTE.

1. Where an action is brought against the makers and indorser of a promissory note, and the makers fail to answer and a judgment of severance is entered against them, pursuant to section 456 of the Code of Civil Procedure:

Held, that the action thereafter may be treated as though the in-

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dorser had been sued alone. (*Fleischmann* agt. *Stern*, ante, 124.)

2. Where the defendant, as indorser of an accommodation note, got his creditor to discount it at a usurious rate of interest, in payment of a past indebtedness upon the statement that it was business paper:

Held, that he was estopped from setting up usury, and that the case of *Payne* agt. *Burnham* (62 *N. Y.*, 69) was no authority, as the passing of the note operated as a payment *sub modo* of the indebtedness until the maturing of the note. (*Id.*)

3. Where an action is brought against the indorser of a promissory note who was the original debtor, and the complaint states that he was indebted to the plaintiffs for goods sold and delivered in an amount about equal to the note, and that was proved by the defendant:

Held, that it was the duty of the judge before whom the action was tried, to direct a verdict for the amount of the goods, and, if an amendment to the complaint were necessary, to have ordered it on the spot. (*Id.*)

PUNISHMENT.

See CONSTITUTIONAL LAW.

Matter of Bayard, ante, 294.

RATIFICATION.

See MUNICIPAL CORPORATIONS.

Edwards agt. *City of Watertown*, ante, 463.

REARGUMENT.

1. The omission of the appellant to present a point appearing in the case upon the argument of a cause in this court is not, as a general rule, a ground for reargu-

ment; the ordinary rule that an exception not raised on argument is to be deemed abandoned will govern. (*Rogers* agt. *Loytin*, 81 *N. Y.*, 642.)

RECEIVER.

1. Where, in a partition suit, one of the parties in interest has in his possession a portion of the estate, and has been in the habit of collecting the rents, as he alleges, for the protection of the income from waste, a receiver of such property should not be appointed upon affidavit, upon information and belief, that such party is of little or no responsibility. (*Darwin* agt. *Wells*, ante, 259.)
2. There is no question as to the right of the court to award to the receiver compensation out of the fund which he holds, even though the title to that fund be found to have been from the first and to be now in the defendants. The receiver's compensation cannot be made to depend upon the result of the litigation. (*Hopfensack* agt. *Hopfensack*, ante, 498.)
3. He is the officer of the court who takes property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party who shall ultimately be found to be entitled to it. Although it may sometimes happen that, by the unfounded claim of a plaintiff, the rightful owner of property is deprived temporarily of the possession of it, and that when he gets it back it is encumbered with the charges of the receiver to whom the court has given the care of it pending the litigation; yet great as may be the misfortune to the owner, he must bear the loss unless he can obtain redress from the party on whose application the receiver was appointed. (*Id.*)
4. Where the appellants were de-

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fendants charged with having property belonging to the co-partnership, to which they got no title because of the fraudulent character of the transfer to them, and the court, by its receiver, took the disputed property into its custody to abide the determination of the action, there being no other fund from which the receiver's legal fees and expenses are payable, he is entitled to them out of the fund in his hand, *i. e.*, the property in dispute, no matter to which of the parties to the action possession of such property has been adjudged. (*Id.*)

See FALSE IMPRISONMENT.

Dusenbury agt. *Keiley*, *ante*, 409.

5. Where an action is brought by a judgment creditor to reach certain shares of mining stock, claimed to belong to the judgment debtor, but which are at the time of the commencement of the action standing on the company books in the name of his wife, the creditor has such "an apparent right to or interest in" the stock, as to entitle him to apply, under section 713 of the Code of Civil Procedure, for the appointment of a receiver thereof, when there is reasonable ground to apprehend that before the suit can be determined the stock will be removed beyond the jurisdiction of the court, or lost in some adverse turn of the defendant's affairs.

The fact that a receiver of the judgment debtor's property has already been appointed in proceedings supplementary to execution, does not bar such an application, nor does it make it necessary that the same receiver should be appointed in granting it. (*State Bank of Syracuse* agt. *Gill and ano.*, 23 *Hun*, 410.)

6. An equitable action by a creditor of an insolvent corporation to reach assets, brought before the remedy at law has been exhausted, cannot be upheld on the ground

that the appointment of a receiver is necessary to preserve the property from misappropriation and waste pending the litigation. (*Adee* agt. *Bigler*, 81 *N. Y.*, 349.)

7. The provision of the Code of Civil Procedure in relation to receivers (*sec.* 713) has not changed the practice in this respect or established any new rule authorizing an equitable action before a judgment is obtained. (*Id.*)

REFEREE.

1. Where a party at the commencement of a reference stipulates with the opposite party to pay half the referee's fees, such stipulation will be enforced (*Following Fischer* agt. *Raab et al.*, 56 *Hew.*, 218-223; and *Bloodgood* agt. *Bloodgood*, 59 *Hew.*, 42.) (*Brick* agt. *Fowler*, *ante*, 153.)

See FEES.

Maher agt. *O'Connor*, *ante*, 103.

McQuien agt. *McQuien*, *ante*, 280.

Lockwood agt. *Fox et al.*, *ante*, 522.

2. Under section 1247 of the Code of Civil Procedure a referee, appointed to sell real estate in pursuance of a judgment, may appeal from an order fixing his fees and compensation for the services so rendered by him. (*Hobart* agt. *Hobart*, 23 *Hun*, 484.)

3. When an adjournment should be granted on account of the professional engagement of a party—when a referee has no power to strike out testimony on the failure of a witness to appear for cross-examination. (*See Matter of Crooks*, 23 *Hun*, 696.)

REFERENCE.

1. A reference to ascertain the damages caused by an injunction can only be had when there has been a final determination that the plain-

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- tiff was not entitled to such injunction, or something equivalent to such a determination. (*Neugent agt. Swan et al.*, ante, 40.)
2. That the injunction was dissolved on motion, pending the action, is not enough, as that may have been done for various reasons in no way affecting the merits, and yet the court might, at the final hearing, decide that the defendant ought to be enjoined. (*Id.*)
 3. Where by supplemental answer, the defendants were allowed by the court to make so sweeping a change in the issue as to aver a fact which occurred after the injunction was dissolved, and in effect not only changed the plaintiff's right to the relief sought, but practically deprived him of it and defeated the object of the action, or rendered it of no value, and as a condition allowed the plaintiff to discontinue without costs, which he did:
Held, that there had not been a final determination by the court, or what was equivalent to one, that the plaintiff was not entitled to the injunction when granted and that the defendants were not entitled to a reference. (*Id.*)
 4. Where a like supplemental answer had been allowed and served, and the action was thereafter ended by what was, in fact, a discontinuance by the consent of the parties and so intended, although it took the form of a dismissal of the complaint:
Held, that the same principle should control as if formally discontinued by consent. (*Id.*)
 5. Where the return and answer to an alternative *mandamus* shows that the trial of the issues made thereby, will involve the examination of a long account, a compulsory reference may be ordered by the court. (*The People ex rel. Farmer et agt. Wadsworth*, ante, 57.)
 6. Sections 1013 and 2083 of the Code of Civil Procedure which are apparently in conflict, reconciled. (*Id.*)
 7. Where, in an action for partition, there are a large number of defendants and many separate appearances, and where the case presents four distinct issues of fact, two of which affect distinct parts of the property, and the other two affect undivided shares in the whole of the remainder:
Held, that, though the cause can be better tried by reference than in any other way, yet, if any of the parties object to a reference, the case must go to a jury. (*Cassedy et al. agt. Wallace et al.*, ante, 240.)
 8. But, except as to the issues raised by claim of ownership of two pieces of the property, a compulsory reference may be ordered, and the action may be severed so as to try separately before a referee the issues as to the remainder of the property, the title to which is not in dispute. (*Id.*)
 9. In an action by attorneys for professional services and disbursements, though the bill of particulars contain a large number of charges, yet, as the services were performed and the disbursements made in the prosecution of a single action, it is not a case within the rule permitting a compulsory reference. (*Tracy agt. Stearns*, ante, 265.)
 10. When a judgment has been entered upon an order confirming the report of a referee, to whom disputed claims against an estate have been referred in pursuance of sections 36 and 37 of 2 Revised Statutes, 88, the court may, upon a motion made upon a case prepared and settled as required by the Code of Civil Procedure, set aside the judgment and grant a new trial. (*Young agt. Cuddy*, 23 Hun, 249.)

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11. A party who appears and unsuccessfully opposes a motion for the confirmation of the report of a referee, appointed in pursuance of the statute to pass upon a claim against the estate of a deceased person, may appeal from the judgment entered thereon without first moving at a special term for a new trial upon a case and exceptions. (*Kellogg* agt. *Clark*, 23 *Hun*, 393.)
12. After an action had been referred, the evidence taken and the case finally submitted to the referee for his decision on the merits, the court granted an order bringing in other parties as defendants, and directing that the cause remain and continue for trial before the referee the same as if the parties added had been parties from the beginning of the action, they to have the privilege, however, of cross-examining the witnesses produced and examined on the trial. It did not appear that the case was one which could have been referred without consent:
Held, that conceding the court had power to bring in the new parties, the residue of the order was erroneous, as the court could not compel them to accept the referee or the evidence taken; that they had at least the right to be heard as to the appointment of a referee, and the right to be present when the witnesses were sworn and examined. (*Wood* agt. *Swift*, 81 *N. Y.*, 31.)
13. The court has power to order a compulsory reference of any controversy between the receiver of an insolvent corporation and a debtor in respect to the debt (2 *R. S.*, 409, *secs.* 68, 73; *id.*, 45, *secs.* 19, 20, 21). (*In re Crosby* agt. *Day*, 81 *N. Y.*, 242.)
14. The jurisdiction of the court to make the order does not depend upon the nature of the defense to the claim. (*Id.*)
15. Such an order is therefore proper although fraud is alleged. (*Id.*)
16. The fact that the receiver has commenced an action at law to recover the debt does not conclude him from afterward applying for a reference. (*Id.*)
17. An order of reference in such case directed the discontinuance of the action without costs:
Held, that it was in the discretion of the court whether or not to allow costs to the defendant. (*Id.*)
18. A proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action, but a special proceeding. (*Roe* agt. *Boyle*, 81 *N. Y.*, 305.)
19. The reversal of a judgment entered upon the report of a referee and the granting of a new trial does not vacate the order of reference; and the new trial must be had before the same referee, unless otherwise specially provided. (*Catlin* agt. *Adirondack Co.*, 81 *N. Y.*, 279.)
20. An order of reference, to take proof as to charges made by creditors against an assignee for the benefit of creditors, is not reviewable here, as it is an order not final, made in a special proceeding (*Code of Civil Procedure*, *sec.* 190, *subd.* 3). (*In re Friedman*, 82 *N. Y.*, 609.)
21. A refusal of a referee to make any findings upon a material question of fact on the ground that it is immaterial presents a question of law (*Code*, *sec.* 993) and is error, although evidence thereon was conflicting. (*See James* agt. *Cowling*, 82 *N. Y.*, 449.)

REMOVAL OF CAUSE.

1. Under the provision of section 5 of the act of March 3, 1875 (18

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U. S. Statutes at Large, 472), there is no doubt of the power of this court to remand a cause at any time before a formal trial of the plenary issues in it, whenever it appears that the court has no jurisdiction of the suit. (*Mackey* agt. *Mallory*, ante, 24.)

2. But the provisions do not require the court to remand the suit unless it appears that the suit does not involve a controversy properly within its jurisdiction. If the suit appears, on the removal papers and the prior record taken together to be a suit properly removable, it is not to be remanded if the question arises solely on those papers. It is the practice of the courts of the United States under the act of 1875, to try the question of jurisdiction on a motion to remand, and before the plenary trial. (*Id.*)
3. For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the court must act in declaring the law upon the question it presents. The record in the state court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes. (*Id.*)
4. Where an action is brought by A. in a state court against B. and C. to obtain an adjudication that a contract made between A. and B. has been rescinded, and a reconveyance to A. of a certain play and a certain invention, which play and invention had been assigned to B., and for an accounting and an injunction to restrain B. from exhibiting said play or using or assigning said invention; and where the complaint states C. is made defendant by reason of his having obtained from B. an

interest in said property and assets, and by reason of his having or claiming such interest adverse to the plaintiff :

Held, denying a motion to remand the case after its removal to this court, upon petition by B., before any answer was put in by either defendant, such petition setting forth that plaintiff is a citizen of the state of New York, while petitioner is a citizen of Connecticut, declaring that the allegations in the complaint as to C. are untrue, that the record before the court shows jurisdiction, and that the allegations of the removing party in the petition must, at this stage of the case, prevail. (*Id.*)

5. Subdivision 3 of section 639 of the Revised Statutes of the United States providing for the removal of actions into the United States courts, on account of prejudice or local influence, was not repealed by the act of March 3, 1875 (18 *U. S. Stat.*, 470), and is still in force. (*Nye* agt. *Northern Central R. Co.*, 24 *Hun*, 556.)
6. Under the said subdivision, the case may be removed at any time before the trial or final hearing, and the fact that it has been on the calendar for five or six circuits before the application is made is no ground for refusing it. (*Id.*)
7. It is not necessary that the petition for removal in such case should show that the parties to the action were residents of different States at the time of its commencement; it is sufficient if it appears that the requisite citizenship exists at the time of the filing of the petition for the removal. (*Id.*)
8. The petitioner need not join in the bond required to be given upon the granting of the application. (*Id.*)

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REPLEVIN.

1. In replevin proceedings in the district courts the undertaking, on the part of the plaintiff, must be approved by the justice, and not by the marshal. (*Grotz* agt. *Hussey*, ante, 448.)
2. An action of replevin cannot be maintained against a freight agent of a railroad company for a refusal to deliver freight to the consignee thereof until certain charges thereon have been paid, where he makes no claim to, and has no possession or control of the property except as the agent or servant of the company. (*McDougall* agt. *Travis*, 24 *Hun*, 590.)

RES ADJUDICATA.

1. The doctrine of *res adjudicata* does not apply with the same strictness to decisions on motions as to judgments. (*Steuben County Bank* agt. *Alberger*, ante, 221.)

SALE.

1. The word "must," in section 1678 of the Code of Civil Procedure, is directory merely, and a foreclosure sale of two buildings is not invalidated because they have been sold together. (*Wallace et al.* agt. *Feely et al.*, ante, 225.)
2. The question whether a sale in one parcel is proper or not, is one that must be determined by the circumstances of each case. (*Id.*)

SEQUESTRATION.

See ALIMONY.

Isaacs agt. *Isaacs*, ante, 369.

SERVICE (AND PROOF OF).

1. Under the provision of the Code of Procedure (sec. 135), which au-

thorized the service of a summons by publication, when it should appear by affidavit, "to the satisfaction of the court, or a judge thereof," that the defendant could not, "after due diligence, be found within the state," the court or judge was empowered to pass upon the sufficiency of the evidence as to the exercise of due diligence. (*Belmont* agt. *Cornen*, 82 *N. Y.*, 256.)

2. Where an affidavit contained allegations tending to show that efforts had been made to find the defendant within the state, and that he was not there, it gave jurisdiction to the court, or judge, to pass upon the question of the sufficiency of the proof; and if so satisfied, neither the order for publication nor the judgment based thereon can be impeached collaterally. (*Id.*)
3. An affidavit, presented on application for an order of publication in a foreclosure suit, showed that plaintiff placed in the hands of the sheriff of the city and county of New York, where the premises were situated, and where the venue was laid, a summons in the action, and received from him an official return that he had used due diligence to find the defendants in his county, but was unable to do so. The affidavit further alleged that the deponent, who was the plaintiff's attorney, had been informed by M., a counselor-at-law, who had had professional dealings with the defendants, that they were non-residents of this state, living in Connecticut, which deponent verily believed to be true. Upon motion to vacate the order and the judgment, the non-residence of the defendants was conceded. Held (FOLGER, *Ch. J.*, and DANFORTH, *J.*, dissenting), that the affidavit was sufficient to give the judge jurisdiction to pass upon the question of due diligence, and to authorize the granting of the order. (*Id.*)

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SET-OFF.

1. The plaintiff, having recovered judgment in an action brought by him against defendant Curry, and having been beaten in another action against Curry, with judgment against him for costs, brought this action to compel a set-off of one judgment against the other, the first with interest, being large enough to extinguish the second; and Curry's attorneys thereupon interposing their lien:

Held, that the statutes regulating set-offs, under which it has been decided that in an action like the present, the lien of attorneys must yield to the right of set-off, having been repealed, section 66 of the Code may be invoked by the attorneys to uphold their lien. (*Ennis* agt. *Curry*, ante, 1.)

SHERIFF.

1. One Anderson having been arrested by a constable by virtue of an execution against his person issued upon a judgment recovered by the plaintiff, was allowed by the constable to go at large upon his promise to appear the next morning and give bail. On the next day the constable, not finding Anderson, left the execution at the sheriff's office, where it was received by a deputy, who found Anderson and told him that he had the execution and had come after him, whereupon Anderson voluntarily went with him to the jail, and there gave bail for the limits. Anderson having afterwards gone beyond the jail limits, this action was brought against the sheriff for an escape:

Held, that although after the voluntary escape suffered by the constable the sheriff had no right forceably to take and detain Anderson under the execution, yet that upon his voluntarily surrendering himself to the deputy the sheriff had the right to receive him, and was liable for his sub-

sequent escape. (*Stickle* agt. *Reed*, 23 *Hun*, 417.)

2. The plaintiff, a sheriff, while at tempting to levy upon certain property under an execution, was informed that it belonged to the judgment debtor's father, and thereupon demanded a bond of indemnity from the judgment creditors, the defendants in this action, who gave to him such a bond containing a proviso that, in case any suit should be brought against the sheriff the judgment creditors should be notified and permitted to defend. The sheriff then levied upon the property, sold it, and paid over the proceeds to the defendants. Thereafter he was sued by the judgment debtor's father, who recovered from him the value of the property taken.

In an action brought by him upon the undertaking:

Held, that he could not recover upon it as he had failed to notify the defendants of the suit, and to give them an opportunity to defend it. (*Preston* agt. *Yates*, 24 *Hun*, 534.)

3. That the action could not be maintained upon an implied promise to repay the money received from the sheriff, as the express contract made between the parties prevented the implication of any other or different contract. (*Id.*)
4. A cause of action against a sheriff for his failure to return an execution against property within the time required by law, and for making a false return, is assignable and the assignee may bring an action thereon in his own name. (*Jackson* agt. *Daggett*, 24 *Hun*, 204.)
5. An application to exonerate a sheriff as official bail, made after the time for answering in an action to charge him as such has expired, is in the discretion of the court below. (*Douglass* agt. *Haberstro*, 82 *N. Y.*, 572.)

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SPECIAL PROCEEDING.

1. A proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action, but a special proceeding. (*Roe* agt. *Boyle*, 81 N. Y., 305.)
2. An order of general term granting a new trial in such proceedings is not appealable to this court; it is not a final order, and in a special proceeding no appeal to this court is authorized except from a final order (*Code of Civil Procedure*, sec. 190). (*Id.*)
3. As a proceeding to vacate an assessment is a special proceeding, it is governed by the limitation prescribed by the Code of Civil Procedure (secs. 388, 414), and a delay in moving, for a less time than there limited, is not fatal to the proceeding. (*In re Manhat. Sogs. Inst.*, 82 N. Y., 142.)
4. An order of reference, to take proof as to charges made by creditors against an assignee for the benefit of creditors, is not reviewable here, as it is an order, not final, made in a special proceeding (*Code of Civil Procedure*, sec. 190, subd. 3). (*In re Friedman*, 82 N. Y., 609.)

SPECIFIC PERFORMANCE.

1. Where plaintiff sues to compel defendant to execute and deliver a lease of certain premises in the city of New York, for the period of four years, from May 18, 1881, upon the ground of part performance of an agreement to lease, and defendant claims that the plaintiff was in possession under an oral lease for one year:

Held, that the rule being that the contract must be established by competent proofs, and be clear, definite and certain, the preponderance, with the conflict of evidence, is with the defendant; and,

therefore, the possession of the plaintiff, as it may have been taken under a letting for a year, cannot be held to be a part performance of the contract alleged by him; nor could the improvements upon the premises be a part performance, as they were not made in pursuance of any provision of the agreement. (*McIneres* agt. *Hogan*, ante, 446.)

STATUTE OF FRAUDS.

1. A., who was indebted to defendants, and was under business obligations to B. upon promissory notes made by the latter for his accommodation, executed a mortgage to B., in trust, to secure the payment of the accommodation notes, and also to secure payment of his indebtedness to defendants. Then B. transferred the mortgage, upon the latter's verbal agreement to become responsible for A.'s indebtedness to him upon the accommodation notes. The property mortgaged was subsequently bought in by defendants, and B., having had to pay the accommodation notes, assigned his claim under the mortgage to plaintiff, who brought this action to enforce it:

Held, that the assignment to B. was a valid consideration for the oral promise, making defendants the debtors of B. and of plaintiff, as his assignee, and their promise to pay the notes is binding upon them. (*Budd* agt. *Thurber et al.*, ante, 206.)

STATUTE OF LIMITATIONS.

See FALSE IMPRISONMENT.

Dusenbury agt. *Keiley*, ante, 408.)

STAY.

1. An interlocutory judgment was entered in this action adjudging a deed given by the plaintiff to

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the defendant to have been procured by fraudulent misrepresentations and undue influence, and directing that it be given up and canceled, and also providing for a reference to take and state an account of the rents received from the premises and the payments made on account thereof. An appeal having been taken from the interlocutory judgment, an application was made for a stay of all further proceedings during the pendency thereof:

Held, that the stay should have been granted. (*Coleman* agt. *Phelps*, 24 *Hun*, 320.)

STOCK.

1. The defendant subscribed for 100 shares of the capital stock of the plaintiff of the par value of fifty dollars each, and gave his check for ten per cent of the amount of the subscription; but before the check was presented for payment it was countermanded by the defendant:

Held (in action to recover the amount of defendant's subscription), that no binding subscription was made by defendant for the stock of the company, because of his failure to make the cash payment of ten per cent required by the statute before the subscription itself could be received by the commissioners; and what was done was entirely ineffectual (*Affirming S. C.*, 58 *How.*, 273). (*Excelsior Grain Binding Company, Limited* agt. *Stayner*, ante, 456.)

STOCK COMPANIES.

1. Although the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares, yet such market value also embraces other essential elements. It is the estimate put on the potentiality of a corpora-

tion to avail itself profitably of its franchise, on its capacity and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value. (*Williams* agt. *Western Union Telegraph Company*, ante, 216.)

2. The difference between the actual value and the sum paid by the Western Union Telegraph Company for the property of the American Union and the Atlantic and Pacific Telegraph Company (if any) is not so great as to authorize finding that the agreement was fraudulent, and therefore should be set aside on that ground alone. (*Id.*)
3. A corporation organized under the laws of the state of New York is authorized by these laws to issue scrip dividend to represent its surplus earnings. (*Id.*)
4. The action of the Western Union Telegraph Company in issuing certificates of stock to the amount of \$15,526,590 is not prohibited by the statute (2 *R. S.* [6th ed.], 398). (*Id.*)
5. The meaning of the words "capital stock," as used in this statute, means the property and franchises of the company, and the statute itself means that no corporation shall divide among its shareholders any portion of "the property and franchises of the company." (*Id.*)
6. The capital stock of a corporation mentioned in its charter is not *per se* a limitation of the amount of property, either real or personal which it may own. It may divide its profits among the stockholders at such times and to such amounts as the directors may deem expedient. Instead of dividing the profits, they may, in their discretion, permit the surplus of property to accumulate beyond their original capital, as the interest of

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the corporation shall appear to dictate; and the corporation has, in the manner provided by law, a right to increase the number of certificates which represent the interest its stockholders have in its corporate fund. Such transaction is neither in law nor in fact a watering of the stock of a corporation. (*Id.*)

7. Chapter 399 of the Laws of 1875, provides the manner in which a company organized under the laws providing for the incorporation of telegraph companies can increase the number of shares of its capital stock:

Held, that the Western Union Telegraph Company has complied with the requirements of this law. It has published the notice as required, and has obtained the written consent of the shareholders owning and holding three-fourths in amount of its capital stock.

Held, also, that this increase of capital stock, authorized as it is by the laws of this state, is not against public policy, because the law-making power of the state has allowed it. (*Id.*)

STREET OPENINGS.

See NEW YORK (CITY OF).

Matter of One Hundred and Thirty-eighth and other streets, ante, 284.

SUBPŒNA.

1. In this action, brought to recover moneys alleged to have been taken from the plaintiffs' firm by the defendant, while employed by it as a bookkeeper or clerk, the latter alleged that the moneys were taken in pursuance of an arrangement made with one Clyde, who was then the senior partner of the plaintiffs' firm, by which the defendant was to have one-

fourth of the profits. The defendant having subpœnaed one of the plaintiffs to produce the books of the firm, the subpœna was thereafter set aside on the application of the plaintiffs, based upon an affidavit of one of their attorneys, stating that he believed that the subpœna was served with a view of annoying the plaintiffs, and that the books called for were from forty-five to fifty in number:

Held, that the court erred in granting the application; that if the subpœna was too broad, the court should have required the plaintiffs to allow the defendant to inspect the books, or have compelled them to produce copies of such portions thereof as were material to the issues. (*Clyde agt. Rogers*, 24 *Hun*, 145.)

SUMMARY PROCEEDINGS.

1. Where, in dispossession proceedings, the tenant admitted that he was the tenant in possession of the premises in question, but denied that any attornment had taken place between him and the relator, it appeared that the relator's claim to the possession of the premises rested upon a lease which was assigned by *mesne* conveyance to him, and that the tenant held possession under one of the assignors; but the lease referred to in the assignments was not produced, and the proceedings were dismissed upon the ground that the relation of landlord and tenant did not exist:

Held, that this was error, because the tenant, having hired from one of the assignors of the lease, was precluded from controverting his landlord's title, and the relator, as assignee, succeeded to the rights of the latter. (*The People ex rel. Barnes agt. Angel, ante*, 157.)

See PRACTICE.

Jessurun agt. Mackie, ante, 261.

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SUMMONS.

1. A failure to name in the summons the county in which the plaintiff desires the trial to be held, is not such a defect as requires the court to set aside its service absolutely; the court may in a proper case deny a motion to set aside the service of such a summons on condition that a proper summons shall, within five days after the entry of the order, be served upon the defendant. (*Wallace* agt. *Dimmick*, 24 *Hun*, 635.)

2. In this action brought by the plaintiff against the defendant, a foreign corporation, to recover for goods sold and delivered to it, the summons was served upon the defendant's president in the city of New York, while he was passing through the state, with his family, on his way to a watering place in another state:

Held, that this was a good service of the summons, under section 1780 of the Code of Civil Procedure, although the president was not in the state upon any business of the corporation or in any official capacity. (*Pope* agt. *Terre Haute Car Manufacturing Co.*, 24 *Hun*, 238.)

SUPERINTENDENT OF POOR.

1. Though a husband, whose wife leaves him while insane, would have been liable at common law to any one who should have supplied her with necessaries, or maintained her, yet an action on such common law liability cannot be maintained by a superintendent of the poor. (*Goodale* agt. *Brocknor et al.*, ante, 451.)

SUPPLEMENTARY PROCEEDINGS.

1. The supreme court is not deprived of jurisdiction in cases of

supplementary proceedings by section 2434 of the Code of Civil Procedure. (*Baldwin* agt. *Perry*, ante, 289.)

2. Section 2458 of the Code of Civil Procedure, providing that proceedings supplementary to execution cannot be instituted upon a judgment recovered for costs only, does not apply to a case where such a judgment was recovered, and an execution issued thereon was returned unsatisfied prior to September 1, 1880. (*Bean* agt. *Tonnelle*, 24 *Hun*, 353.)

3. The failure of the applicant to show, as required by General Rule No. 25, that no previous application for the order has been made is an irregularity which authorizes but does not compel the court to refuse to grant the order or to vacate it after it has been granted. (*Id.*)

4. Where, upon the examination of a judgment debtor in supplementary proceedings, it appears that he has an estate in land, as a tenant by the curtesy, and it is not shown that an execution has been issued and returned upon the judgment since he acquired the said estate, a receiver to sell the same should not be appointed, but the creditor should issue an execution upon his judgment and sell the debtor's estate thereunder. (*Bunn* agt. *Daly*, 24 *Hun*, 526.)

SUPREME COURT.

1. The supreme court has power to open defaults and to vacate judgments, and a judgment entered upon demurrer may be relieved against as well as any other. (*Vanderbilt* agt. *Schreyer*, 81 *N. Y.*, 646.)

SURETIES.

1. Where, in an action against sureties upon a bond given by A.,

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as book-keeper of plaintiff, conditioned that he should faithfully discharge the duties of that position, "and the duties of any other trust or employment," relating to the business of plaintiff, which might be assigned to him or which he should undertake to perform; and A. was subsequently appointed receiving teller of plaintiff, and afterwards was found to be a defaulter, which defalcation occurred long after he was appointed teller:

Held, that the bond in question should not be held to cover this default. (*National Mechanics' Banking Association* agt. *Conklin*, ante, 76.)

SURROGATE.

1. In proceedings to sell the lands of a decedent to pay the debts and claims against the decedent, and to make distribution among the creditors, the surrogate has jurisdiction to hear proofs and decide upon a claim disputed by the executor. (*The People ex rel. Adams* agt. *Westbrook*, ante, 138.)
2. The surrogate has not jurisdiction to decide the question between a creditor of the deceased on the one side and the representative of the deceased upon the other. (*Id.*)
3. It is entirely plain from the provisions of the Code of Civil Procedure (see sections 2755, 2756, 2758, 2761, 2788) upon this subject that the surrogate is the proper if not the ultimate tribunal for the determination of the claims of creditors, whether disputed or not, upon the real estate of the decedent sold under the order of the surrogate for the payment of debts and its proceeds. (*Id.*)
4. *Quære*, whether the surrogate should not delay the hearing upon relator's claims and the making of distribution until the relator's

action, pending in the supreme court, to make the decedent personally liable or his estate chargeable for misappropriating funds equitably belonging to the relator. (*Id.*)

TAXATION.

1. In an action brought by the state against the defendant, a domestic corporation to recover eight-tenths of one per centum upon the entire amount of premiums received by it on its business done in this state during the six months ending the 1st day of July, 1880. The action being based upon the act (*Laws of 1880, chap. 542*) entitled "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations." The act became a law and took effect immediately:

Held, first, that the act should not be so construed as to levy a tax upon the receipts of the defendant from its business during the five months preceding its passage.

Second. That the defendant is not taxable upon the premiums received for insurance upon property situate without the state.

Third. That the defendant is not taxable upon premiums of insurance upon goods imported from foreign countries, and stored in bonded warehouses. (*The People* agt. *National Fire Insurance Company*, ante, 334.)

2. In a suit founded upon the fifth section of the act entitled, "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations," which act became a law June 1, 1880, and took effect immediately (*Laws of 1880, chap. 542*):

Held, that the statute should not be so interpreted as to give to the state the tax upon the income of the defendant for the five months preceding its enactment.

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(*The People* agt. *National Fire Insurance Company*, ante, 342.)

3. The law of 1880 required a semi-annual report from the companies to be taxed, and that such a semi-annual report was to be made, to use the express words of the act, "in each year." As a semi-annual report only, and no other, is called for, and that must be made *each* year, it follows that the section of the statute laying the tax and calling for the report, when it uses the word *hereafter* to designate the commencement of the time when its provisions shall take effect, refers to the years which are to follow the one during which the law was passed (See *The People of the State of New York* agt. *The National Fire Insurance Company of New York*, ante, 334). (*Id.*)

4. The relator was the owner of 221 shares of the capital stock of the First National Bank of Troy, which the assessors, in the imposition of a tax upon him, have valued at sixty-five dollars and fifty-three cents per share. On the 1st day of September, 1880, the relator appeared before the assessors and was sworn and examined orally as to his property. The evidence disclosed debts owing by the relator greater than the value of his personal property, including as a part of such personal property his shares of stock in the bank. Twenty-five thousand dollars of the debt owing by him was for money borrowed of the First National Bank of New York, for which amount such bank held his note, payable on demand. The note had been discounted in May or June, 1880, and with its proceeds such bank had purchased for the relator United States bonds, which it held as collateral security for the payment of the note. The assessors refused to deduct the amount of such note from the taxable property. On *certiorari*, under chapter 269 of

the Laws of 1880, to review the assessment:

Held, that the assessors were not justified in their refusal to deduct the debt owing by the relator in New York from the value of his bank shares. (*The People ex rel. Thurman* agt. *Ryan*, ante, 452.)

5. The obligation held by the New York bank against the relator was a just debt, as it was for money loaned to him, for which he had given his promissory note, payable on demand. That such money had been used to purchase United States bonds, which were pledged to the bank as security for the payment of the note, did not make it less than a just debt, which must, by the Revised Statutes, be deducted from the value of the relator's "taxable personal property," and by the act of 1880 (*chapter* 596), from the value of his bank shares, and for the balance only of such value was the relator taxable. (*Id.*)

TITLE.

1. If land once submerged by the sea shall again be left by the reflex and recess of the sea, the owner shall again have his land as before, if he can make out where and what it was. (*Murphy* agt. *Norton et al.*, ante, 197.)
2. Although while the land continues covered by the sea the title is in the sovereign, yet when the land by natural means emerges, the title of the original owner is restored. (*Id.*)

TRIAL.

1. *It seems*, that in an action to recover damages for injuries occasioned by falling through a coal hole in a sidewalk, it is not necessary to prove negligence on the part of the defendant; nor, in the

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first instance, want of contributory negligence on the part of plaintiff. The action is not based upon negligence but a wrongful act, and all that is necessary for plaintiff to prove to make out a cause of action is, the existence of the hole, defendants' responsibility therefor and that in passing plaintiff fell into it. (*Clifford* agt. *Dam*, 81 N. Y., 52.)

2. In such an action the answer was a general denial. Defendants offered to prove on the trial that they had obtained the usual permit from the proper authorities, authorizing the construction of the vaults under the walk and the coal hole. This was objected to and excluded on the ground, among others, that it was not pleaded:

Held, no error; that, if a permit was material, it could only be to mitigate the act from an absolute nuisance to one involving care in the construction and maintenance; that it was necessary not only to plead it, but to allege and prove a compliance with its terms, and that the structure was properly made and maintained to secure the same safety to the public that the sidewalk would have done without it. (*Id.*)

3. In an action for libel it is for the court to determine whether the alleged libel was a privileged communication; but the questions of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury. (*Hamilton* agt. *Eno*, 81 N. Y., 116.)

4. The rule is the same where the alleged libellous charge is made against a public officer as such. (*Id.*)

5. In such an action defendant's counsel asked the court to charge that unless defendant was moved by actual malice it was not a case

for punitive damages; and that the jury should give such damages only as they thought the plaintiff had really borne. The court refused so to charge, but in reply to the request stated to the jury that malice might be inferred from the falsehood of the charges:

Held, that the request was too broad, as it sought to limit the jury to the actual damage; and that therefore the refusal to charge was not error.

6. The court was also requested to charge that the jury should take into consideration the circumstances attending the making and publication of plaintiff's report, its importance and subject, and the public effect of it, and weigh them in mitigation of damages; the request was refused:

Held, no error; that these facts could not lessen the responsibility of defendant for having charged plaintiff in substance with having taken a bribe. (*Id.*)

7. Where an objection is interposed to an answer to a question after it is given, it is not a ground of reversal if a portion of the answer is competent; the objection must point out specifically the objectionable portion. (*Wallis* agt. *Randall*, 81 N. Y., 164.)

8. Where, after the evidence of a witness as to a matter is excluded, the same witness is allowed to testify fully in reference thereto, this obviates the error, if any, in the prior ruling. (*In re Crosby* agt. *Day*, 81 N. Y., 242.)

9. A general objection to a question calling for an opinion as to the existence of a fact will not sustain an exception to the reception of the testimony where the fact is material; the objection should be put upon the ground that the fact could not be thus proved. (*Id.*)

10. A witness, in answer to a ques-

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tion as to what he said to defendant in reference to a certain transaction, answered that he told defendant, "exactly what was done." Defendant's counsel moved to strike out the answer, on the ground that the witness should state what was said. The motion was denied and exception taken. The witness then proceeded to give a particular narration of what occurred between him and defendant:

Held, that the exception was untenable as the answer could not have prejudiced. (*Id.*)

11. Where, in an action upon an account stated, plaintiff failed to show any assent, express or implied, on the part of defendants, that they were indebted to plaintiff in the balance claimed, and no amendment of the pleadings was asked, *held*, that a dismissal of the complaint was proper, although there might have been some evidence of indebtedness. (*Volkening agt. De Graaf*, 81 N. Y., 268.)

12. Where a complaint states a cause of action *ex delicto* it is not competent at the trial to convert it into one *ex contractu*. (*Neudecker agt. Kohlberg*, 81 N. Y., 296.)

13. Plaintiff's complaint alleged in substance, that a copartnership existed between himself and defendant K., which was doing a prosperous business, that defendants entered into a conspiracy to break up this business, in pursuance of which the other defendants commenced an action against K., in which he offered judgment; the offer was accepted and judgment entered, which was enforced by a levy on K.'s interest in the partnership property. Whereas at the time of the entry of the judgment K. was not indebted to his co-defendant in any sum whatever, but "the supposed debt was acknowledged * * * in pursuance of said conspiracy." Defendants answered, putting in issue the alle-

gations as to the conspiracy and alleging that the judgment was for an actual indebtedness. On the trial it appeared that an indebtedness for the full amount of the judgment existed, but, as the evidence tended to show, the debt was not due at the time judgment was rendered. Defendants moved for a dismissal of the complaint on the ground that the allegations thereof had not been proved. No request to amend the complaint was made:

Held, that a denial of the motion was error. (*Id.*)

14. Also *held*, that aside from the question of pleading and conceding that the debt was not due when judgment was rendered, it did not establish the cause of action; that it was in the power of the debtor and his right to waive the running of the credit and permit the debt to be treated as due and payable; and that with whatever motive it was done this did not aid the plaintiff or give to him a right of action. (*Id.*)

15. Evidence was given on the trial tending to show that prior to the formation of the partnership between plaintiff and K., and as an inducement to the former to enter into it, the other defendants agreed to and did loan a sum of money to K. for two years, which he put into the firm as his share of the capital. The judgment obtained against K. was for the money so loaned. It appeared that the business had resulted in a loss, and that in an action brought by plaintiff a receiver had been appointed:

Held, that if the action had been brought upon the agreement plaintiff would in no view have been entitled to more than nominal damages. (*Id.*)

16. Where testimony is offered, which taken alone is incompetent, but which may be made competent by other evidence, and this the

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party offering it promises to produce, the reception of it at the time is not error, and if the party fails to produce the promised evidence, the opposite party, to save his point, must move to strike out the testimony before the close of the case. (*Bayliss* agt. *Cockcroft*, 81 N. Y., 364.)

17. The reversal of a judgment entered upon the report of a referee and the granting of a new trial does not vacate the order of reference; and the new trial must be had before the same referee, unless otherwise specially provided. (*Cutlin* agt. *Adirondack Co.*, 81 N. Y., 379.)

18. Where upon the trial of an action to compel the cancellation of a deed alleged to have been forged, the issue of forgery was tried by all the parties upon the theory that it depended upon the question whether the signature to the deed was the genuine signature of the apparent grantor, and the referee found it was not executed by him and was not his deed, *held*, that it could not be claimed upon appeal that the grantor may have acknowledged the deed and so bound himself thereby; that the finding interpreted with reference to the issue made, was equivalent to a finding that the deed was neither executed nor acknowledged by the grantor; and that the finding was conclusive here. (*Rem. Paper Co.* agt. *O'Dougherty*, 81 N. Y., 474.)

19. Upon an issue as to the genuineness of a signature to a deed witnesses called to prove that the signature was not genuine and who testified they had seen the alleged grantor write and knew his handwriting, on cross-examination stated that their opinion was partly based on the examination of other instruments which it had previously been proved were genuine, and by a comparison of the signatures thereto with the one in question; but they also testified

that they were able to express an opinion independent of the knowledge derived from such comparison:

Held, that a refusal of the referee to reject the opinions of said witnesses, so far as based upon such comparison, was not error. (*Id.*)

20. The mere proof of the execution of a paper which is not received in evidence furnishes no ground for an exception. (*Id.*)

21. In an action to recover damages alleged to have been occasioned by defendant's negligence, it appeared that plaintiff was a laborer employed in defendant's iron works, which, as plaintiff's evidence tended to show, were under the management and control of one B., defendant himself not living in the place where the works were located, and only occasionally visiting them. At the time of the accident, plaintiff was at work near an engine, when B. carelessly let on steam and plaintiff was injured. The court charged that although B., as an agent or superintendent, represented and stood in the place of defendant, he did so only in respect to those duties which defendant had confided to him as such. Defendant's counsel then requested the further charge that as to any other acts or duties performed by B., in and about defendant's works or business, he was not to be regarded as defendant's representative, but as a fellow-servant with plaintiff. This the court refused to charge, but left it as a question of fact to the jury:

Held (*EARL, DANFORTH and FINCH, JJ., dissenting*), error; that it was a question of law, and the court should have charged as requested. (*Crispin* agt. *Babbitt*, 81 N. Y., 516.)

22. The court was also requested, and refused, to charge that in let-

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ting on the steam B. was not acting in defendant's place :

Held (EARL, DANFORTH and FINCH, JJ., dissenting), error. (*Id.*)

23. On the trial of an action the plaintiff is entitled to go to the jury on any theory consistent with the pleadings which his evidence will justify; before he can be limited to any certain theory, on appeal, it must appear in the case as settled that he has thus limited himself on the trial. (*Hazewell agt. Coursen*, 82 N. Y., 630.)

24. Where, therefore, upon the trial the judge stated to the jury that plaintiff had thus limited herself, but her counsel disputed this and claimed that she had not, and it did not appear in the case that she had assented to any such limit, *held*, that it was error for the court to take from the consideration of the jury another theory presented and supported by the evidence. (*Id.*)

25. Defendants' counsel presented to the court thirteen written requests to charge. The court, after remarking that there were certain requests to charge which it would read, then read nine of the requests. The court did not state in terms as to whether it gave them to the jury as the law, nor did it refuse in terms to charge the four requests not read:

Held, that the inference was that the court intended to charge in accordance with the requests read, and declined to charge the residue. (*Hynes agt. McDermott*, 82 N. Y., 41.)

26. Where a party does not object to improper evidence offered, it is discretionary with the trial court whether or not to exclude it on motion. (*Pontius agt. People*, 82 N. Y., 339.)

27. *It seems*, that the remedy of the party is to ask for instructions to

the jury that they should disregard the evidence. (*Id.*)

28. An exception to the overruling of an objection to evidence, where the objection was made after the evidence has been received, is not available. (*Id.*)

29. Defendants contracted with plaintiff's firm that if the latter would procure for them the advertising work of a Virginia corporation, to be done in various newspapers throughout the country, that they would pay said firm ten per cent on the moneys received by them. A list of 1,130 newspapers was produced, 200 of which were published in this state, and the contract, as testified to by one of the defendants, was for a publication in the entire list. Through the efforts of said firm, defendants procured a contract for the advertising. In an action to recover the stipulated percentage, the defense was that the contract was for the publication of lottery advertisements and so was illegal. The contract between defendants and the Virginia corporation was not produced by them. No evidence was given of a publication in any newspaper in this state, and the monthly bills rendered by defendants for the publication were much less than what was stated to be the charge for all the papers in the list. There was no proof that the contract was in violation of the laws of Virginia, or that the laws of any other state were violated:

Held, that it was a question of fact for the jury, whether the contract with the corporation embraced any newspapers published in this state; that, as it appeared, defendants had control of the contract and did not produce it, every intendment was against them; that a contract to advertise in other states was not shown to be illegal; and that, therefore, a refusal to dismiss the complaint

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was not error. (*Ormes* agt. *Dauchy*, 82 N. Y., 443.)

30. After the motion to dismiss the complaint was denied, defendants not having requested that any question of fact should be submitted to the jury, the court directed a verdict for plaintiff:

Held, that an exception to this direction was not available; that defendants should have asked to go to the jury upon the facts if they desire it. (*Id.*)

31. Where a defendant moves for a nonsuit or rests his defense upon propositions of law and does not request to go to the jury, and his motion is denied, or the law held adversely to him, he is estopped from raising the point upon appeal that there were questions of fact which should have been passed upon by the jury. (*Id.*)

32. Under the provisions of the Code of Civil Procedure (*sec.* 993), which provides that a refusal to make any finding whatever upon a question of fact, on a trial by the court or a referee where a request was seasonably made, is a ruling upon a question of law, a refusal of a request to find a fact, on the ground that the fact is immaterial, presents a question of law, and if the fact be material the ruling is error, although the fact be not conclusively proved, and the evidence as to it is conflicting. (*James* agt. *Coving*, 82 N. Y., 449.)

33. In an action against an assignor of a note and mortgage given to secure its payment upon a covenant as to value of the mortgage; *held*, that the covenant having been given to indemnify against loss on the mortgage, defendant was entitled to have the value of the note allowed in diminution of damages; but that its value at the time of the trial could only be considered, not the value at the time of the assignment; and, as it was admitted on the trial that the

makers of the note had become insolvent and had been adjudicated bankrupts, that a charge of the court as follows was proper, to wit: "that it was unimportant as to whether the makers were or were not solvent at the time of the assignment, but that the only inquiry on the question of damages was whether the mortgaged property was at that time worth less, and how much less than \$4,000." (*Smith* agt. *Holbrook*, 82 N. Y., 562.)

34. Also *held*, that it was not necessary for plaintiff to offer to return the note before bringing the action. (*Id.*)

35. As to whether on payment of the damages, defendant would be entitled to the note or to an assignment of a judgment for deficiency on foreclosure of the mortgage, *quære.* (*Id.*)

TRUSTEES.

See MANUFACTURING CORPORATIONS.
Brockway agt. *Ireland*, *ante*, 372.

TRUSTS.

1. A trust fund, consisting of personal property, upon the death of a trustee descends to and the title vests in his legal representatives. (*Matter of Howell*, *ante*, 179.)
2. The provisions of the statute (*R. S.*, part 2, title 2, chap. 1, sec. 68) giving the title to a trustee to be appointed by the court, apply to trusts in real estate only. (*Id.*)
3. The plaintiff, in 1857, in contemplation of marriage, gave her property by a trust deed to trustees to pay her the income for life, with a provision for her husband if he survived her; but if she survived, the property was to go to such person or persons as she might by will direct, and in de-

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fault of a devise by her it was to descend to her heirs. The plaintiff survived her husband and remarried; and subsequently, in 1872, the trust property was reconveyed to her by the surviving trustee, under the provisions of the act of 1849:

Held (in an action for the partition of some of this property which plaintiff held as tenant in common with one of the defendants), that plaintiff, by the trust deed, divested herself of all her estate in the property, and that she cannot recall the trust; that the supreme court, before the act of 1849, had not power to destroy such trust, and said act did not give authority for its extinguishment, the purpose of the act being to enable trustees, after the act of 1848 had freed married women from their peculiar disabilities, to reconvey to the beneficiaries trusts created prior to that act for the benefit of women contemplating marriage. (*Thebaud agt. Schemerhorn, ante, 200.*)

UNDERTAKING.

1. Where the undertaking and notice of appeal described the judgment appealed from as a judgment entered on March eleventh, when in fact the judgment was entered on March twelfth:

Held, that the respondent was not required to move to set aside the undertaking, but was entitled to disregard it and issue execution. (*Dinkel agt. Wehle, ante, 159.*)

USURY.

See PROMISSORY NOTE.

Fleischmann agt. Stern, ante, 124.

VAGRANT CHILDREN,

1. Children found picking rags in the streets of the city of New

York may be committed to the Catholic Protectory under the act of 1877 (*Laws of 1877, chapter 428*), without notice to parents or guardians. (*People ex rel. Lopardo agt. Catholic Protectory, ante, 445.*)

WILL.

1. Where a testator directs the payment of a part of his estate, with its accumulations, to a granddaughter at her majority, and in case of her death, before becoming of age without issue, "to her then living brother and sisters and the issue of any deceased brother or sister," and said granddaughter died unmarried before attaining her majority, leaving her surviving two sisters and brother of the whole blood and two sisters of the half blood:

Held, that the two sisters of the half blood are entitled to a distributive share. (*Wood agt. Mitchell, ante, 48.*)

2. The testator directed his trustees to set apart a third of the income of his residuary estate for the use of his great granddaughter during her life; the principal sum to go to her children, or, in case of her death without issue, to others. By a codicil, he directed that so much of such income as should not be needed, in the judgment of his executors, for her support, should be invested during her minority, and any accumulations of interest should be added to the principal,

Held, that though the terms of the codicil as to accumulations of income are in conflict with the provisions of the Revised Statutes, yet that this invalidity does not affect the residue of the trust, and that the invalid portion may be dropped. (*Barbour agt. De Forest, ante, 181.*)

3. The testatrix gave real estate to executors, in trust, to receive and divide the rents and profits equally

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between her two sons, A. and B., and her grandson C., until C. should become of age; the property to be then divided in three equal shares, one share each, to be conveyed to A., B. and C., but in case C. should die before such division and conveyance, without issue, then the whole estate was to be divided between and conveyed to the two sons. The testatrix died in 1876. Her son A. died in 1879, intestate, without issue; and her grandson C. died in 1880, intestate, under age, and without issue; his father, the plaintiff, being his sole heir:

Held, that at the time of his death, A. was vested with an interest in the real estate by the terms of the will, and that upon his death his share went to his brother B. and nephew C., and that the plaintiff, the father of C., as the heir of his son, takes his share, which is one-half of one-third of the estate. (*Chapman agt. Nichols, ante, 275.*)

4. The testatrix, who left a niece, Fanny R. Gibson, and a grandniece, Fanny Gibson, mother and daughter, gave \$1,000 "unto my grandniece, Fanny R. Gibson:"

Held, that this constitutes a case of latent ambiguity or equivocation, as to which extrinsic evidence was admissible to prove which of the persons were intended by the testatrix; and as the mother was the nearest of kin to the testatrix, a presumption arises that she was intended. (*Gallup agt. Wright, ante, 286.*)

5. By force of the positive direction in the will to the executors, to sell the real estate of the testatrix and convert the same into cash, there was an equitable conversion of the real estate into personalty at her death. (*Id.*)
6. The testator devised a house and lot to his wife, and authorized his executors "to pay off any mortgages or other incumbrances there

may be on said house and lot at my death, provided the title is in me;" but it appeared that when the testator purchased these premises, in 1874, the conveyance was made directly to his wife, and the title remained in her up to his death. She in the deed assumed payment of a mortgage upon the property. The payment upon the purchase-price was paid by the testator, and he paid the taxes and a portion of the principal of the mortgage, and personally guaranteed the payment of the remainder:

Held, that the testator meant that the executors should pay off this mortgage if the title remained at his death in the condition in which he had placed it. (*Sutherland agt. Clark, ante, 310.*)

7. The questions raised in the answers, upon affairs of administration and payment of legacies, as no questions of doubt arise, are proper matters for legal redress, and are not to be interjected in an action for the construction of a will. (*Id.*)
8. The testator, after making various devises, directs his executors, in the eighth clause of his will, to pay the residue of the net annual income of the estate to his wife, during her life or until she should *remarry*; but in case she should *remarry* she was to have an annual income which was to be readjusted, and she was to receive it during her life, for her sole and separate use, free from any debts or control of her husband. In the tenth clause the testator directs that, upon her death or *remarriage*, all the estate was to be divided between his children and their issue:

Held, that the word "remarriage" occurring in the tenth clause was inadvertently and unintentionally used by the testator as an event which would cut off rights in others and hasten the division of the estate, and that the

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words should be rejected as irreconcilable with the general scope of the will, and as in conflict with the expressed intentions of the testator, both general and special, as shown by the will itself. (*Lottimer et al. agt. Blumenthal et al., ante, 360.*)

9. The testator on the 1st day of July, 1878, made and published his last will and testament, in which is contained the following provision:

"*Second.* I give and bequeath unto the persons hereinafter named as my executors the sum of twenty-five thousand dollars in trust; that they shall keep the same invested and pay over the interest, income and profit thereof to my daughter Elizabeth G. Merriam during her natural life. If, however, she shall marry a second time, then this bequest of such interest, income and profit to her, and the direction to pay over the same to her, shall cease and be void. Upon her death or marriage the said twenty-five thousand dollars shall go absolutely to her children by her present husband, Henry H. Merriam (if any be then living), share and share alike. If any of such children shall have died leaving descendants who are still living, then such descendants shall take the share which their respective parents would have taken had such parents survived. Such share of the principal sum of twenty-five thousand dollars shall not be paid over to the persons entitled to the same respectively, until he or she shall become thirty years of age. If after the death or marriage of the said Elizabeth as aforesaid, she shall leave no descendants by her present husband, then the said twenty-five thousand dollars shall go absolutely to my son, James E. Wolcott, or, if he be dead, then to his descendants." The plaintiff and her husband (Merriam) had separated in June, 1878, and in December, 1878, she went to Chicago,

where she continued to reside till after the death of her father, which occurred in August, 1880. She applied for and obtained a divorce from her husband (Merriam) for desertion, with the knowledge and approval of her father. Before the death of the father, and on the same day her decree of divorce was entered, which was April 29, 1880, she was married to her present husband, Mr. McMullen:

Held, that this plaintiff is entitled to a judgment declaring that she is entitled to receive the interest, income and profit of the \$25,000 from the time of the death of the said testator, and that the condition in said will, to the effect that her interest in or claim to said fund should cease in case of her marriage of a second husband, was and is absolutely void. (*Merriam agt. Wolcott, ante, 377.*)

10. For some purposes a will is considered to speak from its date of execution, and for others from the death of the testator. The general rule is that a will speaks from the death of the testator and not from its date, where there is nothing in its language indicating a contrary intention. When a testator refers to an actual existing state of things, the language is referential to the date of the will. (*Id.*)
11. In respect to conditions subsequent, there must be a capacity and opportunity and an option on the part of the legatee to perform the conditions before a forfeiture of the legacy is or can be incurred. A court of equity, at all times reluctant to enforce a forfeiture or a penalty, will not do so when the victim of it has acted in ignorance of the conditions upon which or with whose non-compliance such forfeiture was involved or dependent. (*Id.*)
12. Where, as in this case, the testator knew that his daughter was

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separated from her husband, and he had abandoned her, and that she had removed to another state to gain a residence which would enable and qualify her to procure a divorce from such husband, he had paid for her support in such state, and defrayed the expenses of the suit to procure such divorce, and knew that she was entitled to marry again after such divorce, which he knew, before his death, had been granted:

Held, that to impose upon her the duty, under the bair of forfeiture of all interest in his estate, to remain unmarried for life, was harsh and cruel in the extreme, when such restriction was contained in a secret will unknown to her, and which she could not know till after his death. In such case the estate, to which the condition contained in such will was annexed, became absolute, to the same effect as if said condition had been fully complied with. (*Id*)

13. Where the marriage of the plaintiff with her present husband took place at 11 o'clock on the morning of April 29, 1880, and the decree of divorce was, in strictness and in fact, actually granted, entered and perfected at or about 2 o'clock in the afternoon of the same day:

Held, that plaintiff's marriage with Mr. McMullen was valid and binding upon the parties. It was made in good faith, both parties supposing and believing that she was actually divorced. The decree for that purpose would be considered as granted at the opening of the court on that day, as the court will not divide a day or examine critically the precise hour of the day in which any act in court is done; inquire into the fractions of a day, except in cases of necessity, for the purpose of guarding against injustice or where important rights are concerned. (*Id.*)

14. Although the plaintiff had com-

menced this action in the name of her former husband (Merriam), the court has power to allow an amendment which shall substitute the name of the plaintiff in her present name of McMullen for her former name of Merriam upon the record, so that she may have judgment in her favor by her present name (McMullen). (*Id.*)

15. The costs of all the parties should be paid out of the residuary funds in the hands of the executor. (*Id.*)

16. The testatrix, who died in 1878, in her will, after providing that all her debts and funeral expenses be paid, directed her executors to keep invested in government bonds \$15,000, and pay the income to her husband, "such payments to commence immediately from and after my decease." She gave a nephew, by the fifth clause, from and after the death of her husband, one equal thirteenth part of \$14,000, together with a like share of her household furniture, immediately after her decease. She also gave him, by the sixth clause, \$5,000 of the proceeds of her real estate. In another clause of the will it was provided that if any of the legatees should die in her lifetime, "or before the time when such money should become payable to them respectively," then the legacies given to the one so dying "shall go to and be paid to his or her lawful issue then surviving." The nephew survived her some months, but died before the probate of the will, in August, 1880, leaving a widow and several children. By his will he gave his interest under his aunt's will to his wife by a second marriage. The children he left were by a former marriage. Eliza Totten, to whom legacies were given in the fifth and sixth clauses, died without issue in the life-time of the testatrix:

Held, 1. That the executors should purchase government bonds of such description as

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\$15,000 would have purchased at the death of the testatrix, and if that sum will not now purchase as many bonds as it would at that time have purchased, they should use moneys of the estate to pay excess of premium. And the husband is entitled to receive out of the moneys in the hands of the executors, interest at the rate of five per cent upon \$15,000, from the death of the testatrix up to the time of the investment of the principal sum.

2. Although it may be true that the duty of burying the body of his deceased wife rests upon her husband, yet the wife may charge by her will her own separate estate with the expenses of her funeral, and she having done so, such expenses cannot be charged to the husband.

3. The nephew being entitled, at the testatrix's death, to his interest in the household furniture, such interest went to his wife under his will.

4. Though the \$5,000 legacy to him was a gift of moneys, yet as it was not payable before an actual sale of the realty, and as the nephew died before it was payable, his executors cannot claim it, and it goes to his children, to whom, on such contingency, it was limited, as does also the legacy under the fifth clause, as it was payable only after the death of the husband of the testatrix, and he still lives.

5. The legacies to Eliza Totten lapse, and she not being a descendant of the testatrix, they are not saved by the statute, and so far as the gifts to her embraced any part of the moneys excepted from the sixth or residuary clause of the will, the testatrix died intestate.

6. The legatees who opposed the probate of the will have not thereby forfeited the legacies in their favor under the clause of the will declaring that any beneficiary who should make opposition or controversy in relation to its validity should thereby forfeit

the bequest to him or her, it not being apparent that the opposition to the probate was not interposed in good faith or that it was vexatious. (*Jackson agt. Westfield, ante, 399.*)

WRITTEN AGREEMENT.

See PAROL EVIDENCE.

Lanphire agt. Slaughter, ante, 36.

WRIT OF PROHIBITION.

1. A writ of prohibition is a preventive remedy, not a corrective one. It can only be used to prevent the doing of an act about to be done, not as a remedy for acts already completed. (*People ex rel. Gould agt. Commissioners of Excise, ante, 514.*)
2. The judicial proceedings of excise commissioners terminates when the board pronounces its judgment revoking a license, and the taking possession of the license is a ministerial act, to which prohibition will not lie. (*Id.*)
3. The provisions contained in section 2100 of the Code of Civil Procedure "that the tribunal proceeded against may be directed to amend or vacate proceedings theretofore taken in the matter, applies only to interlocutory or *mesne* proceedings prior to the final decision. (*Id.*)
4. After judgment had been rendered against defendant, in an action in the marine court, and after an appeal from the judgment had been argued at the general term, but before decision, the defendant died; on motion of plaintiff the marine court granted an order continuing the action against the executor of the will of the deceased defendant, to whom letters testamentary had been issued. The general term, in the meantime,

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reversed the judgment and granted a new trial. On application of the executor the supreme court granted a writ of prohibition, restraining the marine court from entertaining further jurisdiction of the action:

Held, error; also, that the order affected and deprived plaintiff of a substantial legal right, and in effect determined the action, and so was reviewable here. (*People*

ex rel. Egan agt. Justices Marine Court, 81 N. Y., 500.)

5. Also, *held*, that even if the decision of the general term of the marine court was void under the Code of Civil Procedure (*sec* 763), because rendered after the death of the defendant, the point was not available on appeal to this court, from the order granting said writ. (*Id.*)

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